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REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

JEROME B. FISHER, REPORTER.

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VOLUME CXVIII.

1907.

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Volume 100 App. Div. contains a table collecting all the causes published in the Appellate Division Reports passed upon prior to the issue of that volume.

The table published in vol. 110, together with the table in vol. 108, contains causes passed upon from the issue of vol. 100 to April 17, 1906.

JEROME B. FISHER,  
*Reporter.*

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The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 400.) — [RMP.]





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**ANNA LOUISE COSTON and Others, Appellants, v. SPENCER W. COSTON and Others, Defendants, Impleaded with the AMERICAN SECURITY AND TRUST COMPANY, as Executor of and Trustee under the Last Will and Testament of MARTHA J. COSTON, Deceased, Respondent.**

Second Department, March 15, 1907.

**Will — when power of alienation not unlawfully suspended — foreign trustees subject to suit in State court.**

Although the courts of this State have no jurisdiction over a foreign executor, yet when he holds lands in this State as trustee he may be sued as such.

The testatrix left lands in this State in equal shares to the children of a deceased son, providing, "said real estate shall be held in trust by my executor \* \* \* until the youngest of said children shall attain the age of twenty-five years, at which time they shall take the same in fee simple, the net income therefrom being in the meantime paid to them or for their use and benefit."

*Held*, that in determining whether the power of alienation was unlawfully suspended, the first step is to ascertain the intent of the testatrix;

That it was not the intention that the trust should be perpetual, and the clause should be construed to mean that the trust should terminate when the youngest child living at the testatrix's death should attain the age of twenty-five years or the trust become impossible by reason of the prior death of such child;

That so construed the trust was valid because the remainders were limited upon one life only.

APPEAL by the plaintiffs, Anna Louise Coston and others, from an interlocutory judgment of the Supreme Court in favor of the defendant, American Security and Trust Company, as executor, etc., entered in the office of the clerk of the county of Richmond on the 6th day of August, 1906, upon the decision of the court, rendered after a trial at the Richmond Special Term, sustaining the said defendant's demurrer to the complaint.

*Frank Harvey Field* [ *Walter Lester Glenney* with him on the brief], for the appellants.

*John G. Agar*, for the respondent.

MILLER, J. :

The action is for specific performance of a contract made by the respondent's testatrix, whose will was admitted to probate in the District of Columbia. The respondent is sued as executor and trustee, and by demurrer seeks to raise the question of want of jurisdiction. It is not disputed that the courts of this State have no jurisdiction over a foreign executor, but the appellants seek to sustain the complaint against the respondent as trustee, and as the complaint asks for relief which might be granted against the trustee, it becomes necessary to determine the contention of the respondent which prevailed before the learned justice at Special Term that the trust provision is void as offending the statute against perpetuities. I quote the material part of said provision :

"*Fifth.* I give and devise all my real estate situated in the County of Richmond in the State of New York in equal shares to the children of my deceased son, William F. Coston, in the manner following, that is to say : Said real estate shall be held in trust by my executor hereinafter named, until the youngest of said children shall attain the age of twenty-five years, at which time they shall take the same in fee simple, the net income therefrom being in the meantime paid to them or for their use and benefit."

Five children of said William F. Coston survived the testatrix. The complaint is silent as to their respective ages, except for the allegation to the effect that two are minors over the age of fourteen, and that the youngest will not attain the age of twenty-five years until the 15th day of July, 1913. The learned justice at Special Term was of the opinion that the power of alienation was suspended

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for the definite term of nine years and six months, and if that was the effect of the provision quoted, it is unnecessary to discuss the proposition that no valid trust was created, but we think the learned justice erred in so construing said trust provision. In this class of cases it is necessary first to determine the intent of the testatrix; that done, the application of the statute is a simple matter. What did the testatrix mean by saying that the estate should be held in trust "until the youngest of said children shall attain the age of twenty-five years?" Did she mean *until such time as the youngest if living would attain the age of twenty-five years*? She did not say so. In fact, to my mind, she did not say anything suggestive of that construction, and yet that must be the construction adopted if we are to adopt the view that the trust term was measured by years and not by lives. Did she mean *until the youngest of said children attaining the age of twenty-five years should attain that age*? If so, the trust term might be measured by so many lives as there were children under twenty-five years of age, but there is nothing in the complaint to show that more than two were under such age; therefore, we are not to assume that the trust was to continue for more than two lives in being. (*Matteson v. Palser*, 173 N. Y. 404.) While we do not think the construction last above suggested is warranted by the language used, it is certainly the most favorable to the defendants of any which may be regarded even as permissible. We might well, therefore, rest our decision of the question now presented upon the authority cited *supra*, but as it is evident that the proper construction of the provision in question must ultimately be determined, it may help to shorten the litigation by determining that question now, as we do not need to look outside of the will for this purpose.

The expression "until the youngest of said children shall attain the age of twenty-five years," seems hardly to require construction. There might be some doubt whether the words "the youngest of said children" referred to the date of the will or the death of the testatrix, but this doubt, if doubt there could be, is removed by section 54 of the Real Property Law (Laws of 1896, chap. 547), so that we may start with the premise that the expression means *the youngest of said children living upon the death of the testatrix*. The property is to be held then until that child "attain the age of twenty-five years."

This is plain enough except for the possible contingency of the death of such child before attaining that age, which is not expressly provided for, and I am at a loss for a reason for departing from the plain meaning of the language simply because a possible event is not expressly provided against. If the testatrix's intent can fairly be inferred from the language used, it seems to me simpler to supply the missing words than to give the words used an unwarranted meaning. Plainly the testatrix did not intend that the trust should become perpetual. She has explicitly provided that it should terminate when the youngest child living at her death should attain the age of twenty-five years. It must be assumed that the testatrix expected that the trust would terminate in case that event should become impossible by reason of the prior death of such child, because she has not limited the remainders upon any other event. To my mind there can be little more doubt about the intention of the testatrix than would exist had she said, "until the youngest of said children *living at my death* shall attain the age of twenty-five years, or sooner die." There could be no doubt of the validity of such a provision, because the remainders would be limited upon only one life, and it seems to me that that is the only construction which will not do violence to the language used, and this without regard to the rule that the court will lean toward that construction which will sustain the will. The cases of *Staples v. Hawes* (39 App. Div. 548); *Hagemeyer v. Saulpaugh* (97 id. 535) and *Kalish v. Kalish* (166 N. Y. 368), cited by the respondent, are not in point for the reason that by express words the testator in each case measured the trust term by years and not by lives. *Lang v. Ropke* (5 Sandf 363); *Matter of Sands' Will* (3 N. Y. Supp. 67); *Becker v. Becker* (13 App. Div. 342) and *Van Cott v. Prentice* (104 N. Y. 45) are like the case at bar except that in those cases the limitation was until the youngest child attain "twenty-one years," or that in effect, and in each it was held that the trust was valid because terminable upon the death of such child before reaching that age, but it was thought by the learned justice at Special Term, and is urged by the respondent on this appeal, that the fact that the trust term in those cases was measured by a minority distinguished them from the case at bar for the reason that it was formerly held and later provided by statute that for the purpose of determining

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whether there was an unlawful suspension of the power of alienation "a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority." (Real Prop. Law, § 32.) If it were permissible to construe the words "until the youngest of said children shall attain the age of twenty-five years" to mean *until the time when the youngest of said children if living would attain the age of twenty-five years*, there would be force in the distinction, but if we are correct in assuming that the language does not admit of a construction which measures the trust term by years, but that at most the permissible constructions limit the trust either upon a life or upon lives, it is difficult to see how the distinction relied upon can be maintained. In the case of *Matteson v Pulser* (56 App. Div. 91; 173 N. Y. 404) the trust term was thus limited, viz., "until the youngest survivor of my said nieces and nephews shall arrive at the age of thirty years." There were five nieces and nephews, but it did not appear that more than two were under the age of thirty years, and the decision upholding the trust was put upon the ground that the court would not assume that the trust term was measured by more than two lives. This ground of decision was adopted by the Court of Appeals. That case is, therefore, controlling authority against a construction of such a clause as that involved here which would measure the trust term by years and not by lives. A majority of the Appellate Division in that case were inclined to the view that the trust would have been valid even had it appeared that more than two of the beneficiaries were under thirty years of age, and the only doubt that was apparently deemed possible to entertain on this point was as to the construction of the expression "youngest survivor;" whether it meant the youngest who should survive the testatrix or the youngest survivor of the nephews and nieces arriving at the age of thirty years. It was assumed as a matter of course that if the expression meant *the youngest who should survive the testatrix*, the validity of the trust was not even debatable, and while the Court of Appeals did not pass on that question for the reason that it appeared to be involved in a litigation between other parties, the question as stated by that court apparently turned solely on the construction of the expression "the youngest survivor." In the case at bar we have no such ambiguity

The interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to plead over on payment of costs.

HIRSCHBERG, P. J., WOODWARD, JENKS and HOOKER, JJ., concurred.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to the defendant to plead over on payment of costs.

ELLA E SMITH, Respondent, v. CHARLES D. THOMPSON, Appellant, Impleaded with ALEXANDER G. NICHOLSON and Others, Defendants.

Second Department, March 15, 1907.

**Pleading—foreclosure—failure to allege assignment of bond is fatal—appeal from judgment on demurrer brings up the propriety of order on which it is founded.**

A complaint in foreclosure by the assignee of a mortgage which merely alleges the assignment of the mortgage but is silent as to an assignment of the bond is subject to demurrer as frivolous, as the mortgage is a mere incident to the debt and an assignment thereof does not pass the debt.

An order overruling a demurrer is not an intermediate order and may be reviewed on the appeal from the judgment entered thereon although the appeal does not specify an intention to review the order.

An order sustaining or overruling a demurrer is not appealable as it is not one of the orders enumerated in section 1347 of the Code of Civil Procedure and the appeal is from the judgment only.

APPEAL by the defendant, Charles D. Thompson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 15th day of June, 1906, overruling the said defendant's demurrer to the complaint as frivolous.

*Mortimer M. Menken*, for the appellant.

*J. Stewart Ross* [*Effingham L. Holywell* with him on the brief], for the respondent.

MILLER, J. :

This is an appeal from a final judgment in a mortgage foreclosure action, entered pursuant to the direction of the court, in the form of an order in terms overruling a demurrer as frivolous. The complaint alleges the making of a bond and a mortgage to secure

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the payment thereof to the St. Regis Realty Company and the assignment of the mortgage to the plaintiff, but does not allege an assignment of the bond, and the point sought to be raised by the demurrer was that as the mortgage was an incident to the debt, an assignment of it did not pass the debt itself. The precise question was presented by demurrer in *Manne v. Carlson* (49 App. Div. 276). We desire to add nothing to the opinion of Mr. Justice INGRAHAM in that case, and upon its authority hold that it was error to overrule the demurrer as frivolous.

A point was made upon the argument that the only question presented by the appeal is whether the judgment complies with the order directing its entry, for the reason that the notice of appeal does not state any intention to review said order. If said order be an "intermediate order," and if the appellant could have appealed from it pursuant to section 1347 of the Code of Civil Procedure, it is clear that the appeal from the judgment without specifying an intention to review the order only presents the question whether the judgment conforms to the order. (Code Civ. Proc. §§ 1301, 1316; *Reese v. Smith*, 95 N. Y. 645.)

An order sustaining or overruling a demurrer is not appealable because it is not one of the orders enumerated in said section 1347; the appeal is from the judgment only. (*Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514.) I do not refer to the many cases decided upon the authority of that case for the rule is so well settled that appellate courts now dismiss appeals from such orders without comment. To be sure, in such case it is held irregular to enter a formal order, as the decision is not an order, but as bearing on the question here can it matter that the direction for judgment is made upon a summary application instead of at a trial? Section 247 of the Code of Procedure, from which section 537 of the Code of Civil Procedure was derived, merely provided a summary way to get the relief that formerly could be obtained only on trial. Whether the direction for judgment be in form a decision or an order, its effect is the same, *i. e.*, a judgment, and if in form an order, it is not intermediate within the meaning of section 1301 of the Code of Civil Procedure, for nothing remained to be done but to enter the judgment pursuant to its authority. (*Becker v. Koch*, 104 N. Y. 394.) In *Fox v. Matthiessen* (155 N. Y. 177) the word "inter-

mediate," as used in section 1316, was said to mean "between the two extremes of service of summons and entry of judgment." But that case dealt with an order denying a motion for a new trial made before the entry of judgment, and has no application to a decision, even though in the form of an order, whose only effect is an authority to enter judgment. Such direction does not seem to be an order as defined by section 767 of the Code of Civil Procedure, because it is *contained in* the judgment, but the Code of Civil Procedure seems to treat a direction for judgment as an order (§ 1303), and it is held that it may be an order if in form one. (*Elwood v. Roof*, 82 N. Y. 428.) But the application is "*for judgment*" (Code Civ. Proc. § 537), and I can see no reason why a formal order is indispensable or why the appeal from the judgment does not raise the propriety of the decision directing its entry merely because that decision happens to be a formal order. In questions of practice uniformity of rule is more important than soundness of reason for the rule. Our research, entirely unaided by any on the part of counsel, has failed to disclose a single case even intimating that an appeal from a judgment entered for frivolousness of a demurrer does not bring up for review the propriety of the direction for its entry. On the contrary, there are decisions to the effect that after entry of judgment the appeal lies from the judgment alone. So far as the question involved here is concerned, sections 247 and 349 of the Code of Procedure, as amended in 1852, were the same in substance as sections 537 and 1347, respectively, of the Code of Civil Procedure, except that section 349 of the Code of Procedure, as amended in 1851, expressly provided for an appeal from an order *sustaining or overruling a demurrer*. That provision was omitted from the Code of Civil Procedure, and in place of it there is a provision for an appeal from the interlocutory judgment. (Code Civ. Proc. § 1349.) The decisions under the Code of Procedure are not in harmony on all points, but there was no conflict, so far as I have been able to discover, upon the point that after entry of judgment the appeal was from the judgment alone. (*Witherhead v. Allen*, 28 Barb. 661; *Parker v. Warth*, 5 Hun, 417.) There had been conflict on the point whether the appeal could be taken from the order before entry of judgment, some cases holding that there could be no appeal except when the order was conditional, *i. e.*, interlocu-



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tory, some that there could be no appeal in any case, and some that there could be an appeal in any case before judgment. (See *Lewis v. Acker*, 8 How. Pr. 414; *Bauman v. New York Central R. R. Co.*, 10 id. 218; *Nolton v. Western R. R. Corp.*, Id. 97; *King v. Stafford & Maxwell*, 5 id. 30; *Lee v. Ainslee*, 1 Hilt. 277; *Joannes v. Day*, 3 Robt. 650; *Harris v. Hammond*, 18 How. Pr. 123.) It was held that a judgment could not be directed under said section 247 of the Code of Procedure where the notice of motion asked for an order instead of a judgment. (*Darrow v. Miller*, 5 How. Pr. 247; *Rae v. Washington Mutual Ins. Co.*, 6 id. 21.) It was even debated whether upon the determination of such an application the prevailing party was entitled to tax trial costs. (*Roberts v. Morrison*, 7 How. Pr. 396; *Butchers & Drovers' Bank of Providence v. Jacobson*, 22 id. 470; *Prutt v. Allen*, 19 id. 450.) The distinction between an order striking out the pleading and one directing judgment for the frivolousness of the pleading was pointed out by Judge SELDEN in *Briggs v. Bergen* (23 N. Y. 162), and the practice indicated by him was an appeal from the order in the one case, for the reason that the pleading when stricken out is no longer a part of the record, and the judgment goes by default, and in the other case an appeal from the judgment. The same distinction was made in *Webster v. Bainbridge* (13 Hun, 180). So it will be seen that the decision in *Elwood v. Roof* (*supra*), followed in *Charlton v. Webster* (44 N. Y. St. Repr. 117), only settled a point upon which there had been a conflict, viz., that where a formal order was entered an appeal could be taken from it *before the entry of judgment*, but that decision in no way disturbed the rule, upon which the authorities appear to be harmonious, that, after the entry of judgment, the review is by appeal from the judgment alone, and *Becker v. Koch* (*supra*) is, therefore, decisive of the question.

I think the appellant has followed the practice indicated by the authorities. The point presented by the demurrer was fatal to the complaint, and the judgment should be reversed.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and RICH, JJ., concurred.

Judgment reversed and case remitted to the Special Term for trial and determination, costs to abide the final award of costs.

A. N. RIDGELY, Respondent, v. TALBOT J. TAYLOR & COMPANY, a Firm Composed of TALBOT J. TAYLOR and Others, Appellants.

Second Department, March 15, 1907.

**Contract to pool stocks — agreement allowing members to sell inconsistent therewith.**

When a plaintiff, suing brokers for refusal to sell certain stock purchased for him as a member of a pool, testifies to an agreement that as a member of the pool he might sell his stock at any time on order, but admits that the right of members of a pool to sell would render it ineffective, and it is shown that he was a financial writer and perfectly familiar with the operation of pools and syndicates, his testimony that his contract entitled him to sell his holdings is so inconsistent with the necessities of a successful pool agreement that a verdict in his favor is against the weight of evidence.

(Per GAYNOR, J.): The alleged agreement permitting the plaintiff to sell was inconsistent with the pool and a breach of trust or fraud upon his associates and invalid.

APPEAL by the defendants, Talbot J. Taylor and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 8th day of December, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 20th day of December, 1905, denying the defendants' motion for a new trial made upon the minutes.

*Augustus Van Wyck* [*Philip J. Britt* and *John Henry Hammond* with him on the brief], for the appellants.

*O. N. Brown* [*I. R. Oeland* with him on the brief], for the respondent.

MILLER, J. :

This case has been tried twice, each trial resulting in a verdict for the plaintiff. On the first trial the court set aside the verdict and dismissed the complaint. This we held was error (107 App. Div. 265), but as we were not satisfied with the verdict we did not reinstate it, but granted a new trial. The defendants now appeal from a judgment entered on a second verdict and from an order

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denying a motion for a new trial. The nature of the action was stated by us in rendering the judgment on the first appeal; we then said: "The plaintiff's evidence established, if true, a distinct independent agreement to purchase, carry and sell upon order 1,000 shares of stock, of which the signing of the pool agreement was a mere incident." We also called attention to the fact that the testimony of one of the defendants tended to substantiate the claim that the pool agreement was collateral to the agreement for breach of which the action was brought. The evidence upon this point in the record now before us is not quite so clear as upon the former trial, but the plaintiff does testify that the defendants agreed to purchase for him 1,000 shares of pool stock at not more than sixty, to carry the same upon a margin of five per cent, and to sell upon order; that subsequently they notified him that the stock had been bought, and that thereafter at their request he authorized them to sign the pool agreement, but that it was never submitted to him and he was ignorant of its contents. The case was tried and submitted to the jury by the learned trial justice in exact accord with our former opinion, but it is now urged that the finding of the jury that the contract was made as claimed by the plaintiff is against the weight and preponderance of the evidence.

The pool agreement and the plaintiff's letter authorizing the defendants to sign it on his behalf are in evidence. That agreement provides for the purchase of not more than 400,000 nor less than 200,000 shares of stock, for the appointment of a manager with authority to buy and sell at his discretion, and for a continuance of the pool until April 1, 1903. On the first trial the plaintiff testified that he had known of pool agreements which permitted the members of the pool to sell independently of the pool. On the trial now being reviewed he said he had known of one such pool which he termed a "floating pool," whose members contributed from one dollar up and were permitted to come in at a stated price and go out when they wished, but he admitted that no such arrangement would be practicable in the case of a pool of from 200,000 to 400,000 shares, and that to make such a pool a success its members would have to adhere and could not be permitted to sell individually. He also admitted that it would require some time to buy as much as 200,000 shares of stock to advantage and that of necessity

the purchase would be at varying prices, and it appears that the 200,000 shares of stock necessary to be purchased before the pool by its terms was to become operative were not purchased until some time after January, 1902, the date of the pool agreement. Monthly statements of the plaintiff's account were rendered him by the defendants containing the following item: "Participation. So. Pac. Syn. 1000 Shrs." It appeared from the plaintiff's testimony that his sole business was that of financial writer and stock speculator; many of the forecasts furnished by him to customers as a guide to Wall street speculation are in evidence and they show that according to his own claim he was no novice in Wall street methods but was well versed in the operations of pools, syndicates, etc. His testimony contained in this record respecting the requisites of a successful pool agreement is so inconsistent with the agreement which he claims was made, and all the record evidence is likewise so inconsistent therewith, that we think justice requires a new trial.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

HIRSCHBERG, P. J., JENKS and HOOKER, JJ., concurred; GAYNOR, J., concurred in separate memorandum.

GAYNOR, J. (concurring):

I concur, but desire to put my vote on the further ground that the plaintiff knew, and would have to be deemed as matter of law to know, what a pool to buy and sell stocks is; and that therefore for him to have an agreement with the brokers representing the pool, the agents of the pool, unknown to his associates in the pool, that he could have such brokers sell out for him the shares of stock representing his interest in the pool whenever he saw fit, would be inconsistent with the purposes of the pool, and a breach of trust or a fraud in respect of his said pool associates. The pool meant that they were to stand together—buy together and sell together and share the profit or the loss—and no secret agreement in conflict with that status and purpose could be valid. The plaintiff could not be both in the pool and out of it. By secretly selling when he saw fit he could injure the pool—all of his associates. He could reap a profit, not share it with them, and in the end not share the

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loss, if there should be one. His claim is that he had such an agreement with the brokers, but the law did not suffer him to have such an agreement, and it therefore goes for naught if it exists.

Judgment and order reversed and new trial granted, costs to abide the event.

ALEXANDER G. NICHOLSON, Respondent, v. THE BROOKLYN HEIGHTS  
RAILROAD COMPANY, Appellant.

Second Department, March 15, 1907.

**Railroad — refusal to accept transfer — measure of damages of passenger  
ejected.**

A passenger upon a surface railroad was given a transfer so punched that the time limit had already expired. On calling the attention of the conductor to the fact he was assured that the transfer would be honored. The transfer, however, was refused by the conductor on the car to which the passenger transferred and he was ejected.

In an action for damages,

*Held*, that the plaintiff was not entitled to recover damages consequent upon his unlawful ejection as he had boarded the car knowing that the transfer upon its face did not entitle him to ride;

That the act of the conductor in refusing the transfer and ejecting the plaintiff was not unlawful or wrongful;

That although the plaintiff might be entitled to recover the statutory penalty and the price paid for his fare, he was not entitled to recover in addition for indignities to which he voluntarily subjected himself.

HOOVER, J., dissented.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 1st day of June, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 18th day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

*I. R. Oeland* [*George D. Yeomans* with him on the brief], for the appellant.

*Mortimer M. Menken*, for the respondent.

MILLER, J. :

The plaintiff has a judgment entered on the verdict of a jury for damages consequent upon an alleged unlawful ejection from one of the defendant's cars. The defendant claims that the complaint should have been dismissed. The jury were at liberty to find from the plaintiff's evidence that he entered a car on one of the defendant's cross-town lines, paid his fare and demanded a transfer, which he noticed, upon receiving it, was so punched that the time limit indicated had already expired; that, upon calling this fact to the attention of the conductor and demanding another transfer, he was assured that it was all right; that at the intersection with the line which he desired to take he alighted, boarded the proper car and tendered the conductor the transfer; that the conductor refused to take it, demanded his fare, and, upon his refusal to pay the fare, ejected him from the car.

Practically the only disputed question submitted to the jury was whether the conductor issuing the transfer assured the plaintiff that it was all right, and apparently this question of fact was deemed the pivotal question in the case. The defendant's right to make all reasonable rules to which the passenger's contract of carriage is subject is not disputed and need not be discussed, nor is it disputed that the defendant was bound to give the plaintiff a transfer entitling him to a continuous trip for a single fare, and that for its refusal to do this the plaintiff could have recovered the penalty of fifty dollars provided by statute. He could also recover any excess fare exacted of him, but it does not follow that he could knowingly board a car with a ticket, which upon its face did not entitle him to a ride, and recover for being ejected by a conductor who acted strictly within his duties. The act of the conductor in ejecting him was not wrongful or unlawful. Passengers must know that conductors cannot dispense the rules of the company, and if they do not the law charges them with such knowledge. The plaintiff knew that the time indicated by the ticket within which he could be carried on the line to which he intended to transfer had expired and he had no business to act upon the assurance of the conductor or to expect that the conductor on the line to which he transferred could take his word in direct contradiction of the ticket. The plaintiff's ejection from the car was not consequent upon the wrongful act of the

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conductor who issued the transfer but rather upon his own disregard of the defendant's rules to which he as well as the conductors was subject. As well might the plaintiff recover if the conductor had refused to issue any transfer at all. The actual damage resulting from such refusal as a rule would be measured by the value of the transfer, *i. e.*, five cents. In order to compel obedience to the law requiring street surface railroads to give a passenger a continuous trip over connecting lines for a single fare the Legislature has provided a penalty, but the law does not contemplate that in addition to that the passenger may recover for indignities to which he voluntarily subjects himself. Whatever doubt there may have been on this question was settled by the Court of Appeals in *Monnier v. N. Y. C. & H. R. R. Co.* (175 N. Y. 281). It is impossible to distinguish that case from the case at bar, because as we have seen the plaintiff could not rely upon an assurance which he was bound to know was false. Our attention is called to *Jenkins v. Brooklyn Heights R. R. Co.* (29 App. Div. 8); *Eddy v. Syracuse Rapid Transit R. Co.* (50 id. 109); *Jacobs v. Third Ave. R. R. Co.* (71 id. 199), but those cases are all distinguishable from the case at bar and it is unnecessary now to determine whether or to what extent they have been overruled by the *Monnier* case. In the *Jenkins* case the plaintiff boarded the first car in which he was able to obtain a seat and the transfer ticket was properly punched. In the other two cases relied on the plaintiff boarded the car not knowing that his transfer had been improperly punched. Whether within the doctrine of the *Monnier* case that makes any difference we do not need now to determine. Said cases relied upon by the respondent are cited in *Gillespie v. Brooklyn Heights R. R. Co.* (178 N. Y. 347), but in that part of the opinion in which the learned judge who wrote discussed the rule of damage.

The judgment and order should be reversed.

JENKS, GAYNOR and RICH, JJ., concurred; HOOKER, J., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

SAMUEL FRANCK EDMead, Appellant, *v.* FRANK P. ANDERSON and MAUDE E. ANDERSON, Doing Business under the Firm Name and Style of ANDERSON & COMPANY, Respondents.

Second Department, March 22, 1907.

**Conditional sale — effect of retaking property.**

When the vendor under a conditional sale retakes the property on the default of the vendee, he is not entitled to both the property and the purchase price. Under such circumstances a claim for the purchase price is not available as a counterclaim.

APPEAL by the plaintiff, Samuel Franck Edmead, from a judgment of the Municipal Court of the city of New York in favor of the plaintiff for the sum of twenty-eight dollars and thirteen cents.

*S. Franck Edmead*, for the appellant.

*Henry A. Heiser*, for the respondents.

WOODWARD, J. :

The plaintiff sued for a fee for legal services alleged to be due to him from the defendants. The defendants in their answer set up that the plaintiff's services were not worth the sum of fifty dollars, the amount claimed in the complaint, and denied the agreement to pay the same. They also interposed a counterclaim for thirty-five dollars, made up of two items, twenty-four dollars for four months' rent of a piano by plaintiff from defendants, and eleven dollars for cartage thereof, the piano having been sold by the defendants to the plaintiff on the installment plan, ten dollars having been paid upon its delivery. The plaintiff had defaulted on four monthly payments on the contract and the defendants had retaken the piano under the same contract, the cartage being for the delivery and taking away of the piano.

It is entirely evident from the amount of the judgment that the court allowed the plaintiff the full amount of his claim of fifty dollars, and offset against it the counterclaim of thirty-five dollars heretofore described. I think this was error. It seems to be the settled law of this State that the vendor under a conditional sale cannot have both the property and the purchase price, and in this case



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the defendants had elected to retake the piano, and whatever rights they may have against the plaintiff under this contract for the piano they cannot be enforced here. (*White v. Gray's Sons*, 96 App. Div. 156, and cases there cited.)

The judgment of the Municipal Court should be reversed and a new trial granted, with costs to the appellant to abide the event.

JENKS, GAYNOR and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, with costs to the appellant to abide the event.

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MANHATTAN OIL COMPANY, Respondent, v. THOMAS GILL and Others,  
Appellants, Impleaded with GEORGE S. GILL and MARY I. ROSE,  
Defendants.

Second Department, March 22, 1907.

**Partnership — will — legatees not liable as partners when representative continues business as authorized.**

Beneficiaries who consent that an administrator with the will annexed continue the testator's business as directed by the will are not partners nor individually liable to one who deals with the administrator with knowledge of his representative capacity.

An executor authorized to continue the testator's business is not entitled to involve the general assets of the estate, and persons dealing with him are bound to know that they can resort only to the property embarked in the business. They have no recourse to the general assets of the estate, nor can they look to the beneficiaries individually. The rule holds although, with the consent of the beneficiaries, the administrator continues the business for a year beyond the time set by the will.

Under such circumstances the beneficiaries are not individually liable because the property has been transferred to them and by them to a corporation of which they are stockholders.

APPEAL by the defendants, Thomas Gill and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 17th day of July, 1906, upon the verdict of a jury rendered by direction of the court after a trial at the Kings County Trial Term, and also from an order entered in said clerk's office on the 18th day of July, 1906, denying the said defendants' motion for a new trial made upon the minutes.

*Albert G. McDonald*, for the appellants.

*Herbert M. Johnston* [*Robert W. Thompson, Jr.*, with him on the brief], for the respondent.

MILLER, J.:

This is an action at law to recover the purchase price of certain goods alleged to have been sold to the defendants as partners. The partnership is denied. The defendants are the beneficiaries under the will of Thomas Gill, deceased, which contained a provision directing his executors to continue his business until his youngest son should reach the age of twenty-one years. The business was conducted by the defendant George S. Gill, as administrator with the will annexed, the executor having died. Said youngest son, the defendant Thomas Gill, became of age February 18, 1899, but said administrator continued the business in the same manner until some time in April, 1900, when he assigned his interest in the property to the other defendants, who organized a corporation and transferred the property to it, taking stock in proportion to their interests. It appears that said business was conducted by said George S. Gill, as administrator aforesaid, with the consent of all of said beneficiaries, who released the surety on his bond as administrator from all liability to them on account of the continuance of said business, doubtless because the surety did not want to hazard the risks of said business. The plaintiff dealt with said George S. Gill understanding fully his representative capacity, made its bills to the estate of Thomas Gill and received checks in payment signed "Est. of Thos. Gill, George S. Gill, Admr." Said defendant Thomas Gill worked for the said George S. Gill as a clerk at a weekly salary; the other defendants had nothing whatever to do with the conduct of said business.

The foregoing is a recital of all the essential facts and I apprehend it will be impossible to find in the books a single authority to sustain the action, and certainly upon principle it cannot be maintained in its present form. The relation of partnership can be created only by contract. The defendants were not partners, nor did they hold themselves out to the world as such. The plaintiff dealt with an administrator whose authority it was bound to know. Many of the cases dealing with the continuation by the representa-

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tive in the business in which the decedent was interested either as partner or as sole proprietor are collated in *Cyclopedia of Law and Procedure* (Vol. 18, p. 241 *et seq.*) and a statement of the rules applicable to such a situation may be found in the opinion of Judge ANDREWS in *Willis v. Sharp* (113 N. Y. 586), a leading case in this State. That case decided that an executor might continue the business and that the general assets might be liable for the debts created in case of the insolvency of the executor where the testator by explicit and unequivocal language so directed; the executor, however, cannot continue the business unless plainly authorized to do so, and in case he does without explicit authority the creditors must look to him individually (*Saperstein v. Ullman*, 168 N. Y. 636; *Delaware, Lackawanna & Western R. R. Co. v. Gilbert*, 44 Hun, 201; *affd.* on opinion below, 112 N. Y. 673), and even though the executor is explicitly authorized to continue the business he cannot bind the general assets of his estate unless authorized to do so. (*Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430; *Burwell v. Cawood*, 2 How. [U. S.] 560.) In the case at bar the executor was authorized to continue the business. He was not authorized, however, to involve the general assets of the estate; therefore, persons dealing with him were bound to know that they could resort only to the property embarked in the business. They could not even have recourse to the general assets of the estate, much less could they look to the beneficiaries individually, and the assent of the beneficiaries to what the will explicitly authorized could upon no possible theory make them personally liable. To be sure, the administrator continued the business a year after he probably should have brought it to a close, and this was not strictly within the letter of his instructions and must be deemed to have been assented to by said beneficiaries, but such assent did not make them partners or liable personally in any capacity. It merely made the transaction a valid one as between the parties thus assenting to it (*Stewart v. Robinson*, 115 N. Y. 328; *Bell v. Hepworth*, 134 id. 442); nor can the defendants be made individually liable in this action because of the transfer to them of the property and the transfer of it by them to the corporation of which they were stockholders. I do not say that the creditor had no equitable lien upon the property or that in an appropriate action

he could not secure the enforcement of that lien, or in lieu thereof have some remedy against those receiving the property; nor need we undertake to decide what remedy the plaintiff might have against the said George S. Gill, either individually or in his representative capacity. The respondent cites cases in which legatees and devisees have continued the business of their testator as partners, but those cases can have no application to a case in which the business was conducted by an administrator as such.

The judgment and order should be reversed.

HIRSCHBERG, P. J., WOODWARD, JENKS and HOOKER, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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CONRAD BELLOFF and HELENA BELLOFF, His Wife, Respondents, v.  
THE DIME SAVINGS BANK OF WILLIAMSBURGH, Appellant.

Second Department, March 22, 1907.

**Payment — when moneys not paid under mistake of fact — conveyance by devisee when child born after making of will.**

The lack of authority of a sole devisee to convey lands when a child was born to the testator after the making of the will is not a question of fact, but one of law, and one who has taken title and paid a subsequent mortgage on lands conveyed under such circumstances cannot recover on the theory that the payment was made under a mistake of fact, where there is neither testimony nor finding that the plaintiffs were ignorant or mistaken respecting any of the facts involved.

The deed of the widow was not invalid, being effective to convey her dower right, and moreover, as the widow's action for dower was not barred, the person paying the mortgage was subrogated to the equitable rights of the mortgagee.

The cases in which moneys paid may be recovered may be grouped under three heads: (1) When payments are induced by fraudulent misrepresentation; (2) when made under coercion either in fact or in law; (3) when made under a mistake of fact.

RICH, J., dissented.

APPEAL by the defendant, The Dime Savings Bank of Williamsburgh, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings

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on the 13th day of April, 1906, upon the decision of the court rendered after a trial at the Kings County Trial Term, a jury having been waived.

*Otto F. Struse*, for the appellant.

*James Troy* [*Thomas H. Troy* with him on the brief], for the respondents.

MILLER, J. :

This action is to recover moneys alleged to have been paid under a mistake of fact. Plaintiffs had judgment and the defendant appeals.

One William Barnes died July 2, 1885, leaving a last will and testament purporting to bequeath and devise all of his property to his wife. A child was born after the making of the will, which fact is shown by the record of the proceedings admitting the will to probate. The widow, apparently assuming that the devise to her was not affected by the subsequent birth of the child, assumed to convey certain real property owned by the testator. In 1901, Stephen Burkhard, assuming to have title to the premises so conveyed through attempted mesne conveyances, executed a mortgage thereon to the defendant to secure the payment of his bond for the sum of \$5,000, and thereafter by warranty deed assumed to convey the property to the plaintiffs, who paid the mortgage on July 2, 1902, and now claim that said payment was made under a mistake of fact. The plaintiff Conrad Belloff testified to the mistaken belief on his part that Burkhard's deed conveyed title in fee to the premises and that the mortgage was a valid lien thereon, and this is the mistake found by the court and relied on to support the judgment. The widow of William Barnes is still alive. It is conceded that the defendant acted in entire good faith.

The legal effect of the deed to the plaintiffs was not a question of fact, and there is neither testimony nor finding that the plaintiffs were ignorant of or mistaken respecting any of the facts involved in the determination of the question of law. The deeds were not wholly invalid, as they operated to assign the widow's dower interest. (*Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324.) The action for dower was not barred (Code Civ. Proc. § 1596) when the

mortgage was paid, and the persons paying the mortgage were entitled to be subrogated to the equitable rights of the mortgagee. (*Everson v. McMullen*, 113 N. Y. 293.) None of the cases relied upon by the respondents are in point. They may be grouped under three heads: (a) Payments induced by fraudulent misrepresentations—it is conceded that there was no fraud; (b) payments made under coercion either in fact or in law—the payment was not involuntary merely because it was demanded; (c) payments made under a mistake of fact—the error was a mistake of law. The familiar rule is not questioned that money paid upon a claim of right cannot be recovered back merely because the payor mistook the law. (*Brisbane v. Darcas*, 5 Taunt. 143; *Clarke v. Dutcher*, 9 Cow. 674; *Mowatt v. Wright*, 1 Wend. 355; *Champlin v. Laytin*, 6 Paige, 189; 18 Wend. 407; *Silliman v. Wing*, 7 Hill, 159; *Supervisors of Onondaga v. Briggs*, 2 Den. 26; *New York & Harlem R. R. Co. v. Marsh*, 12 N. Y. 308; *Phelps v. Mayor*, 112 id. 216; *Pooley v. City of Buffalo*, 122 id. 592; *Redmond v. Mayor*, 125 id. 632.) The question whether the plaintiffs could plead ignorance of facts appearing of record in their chain of title or discoverable upon such inquiry as the record would suggest (*Moot v. Business Men's Investment Assn.*, 157 N. Y. 201) is not now before the court, nor is it necessary to determine how that question would be affected by the fact that since the payment of the mortgage the situation of the parties has changed because of the running of the Statute of Limitations against the action for dower. (See *Kingston Bank v. Eltinge*, 40 N. Y. 391; *National Bank of Commerce in N. Y. v. N. M. Banking Assn. of N. Y.*, 55 id. 211; *Mayer v. Mayor*, 63 id. 455; *Curnen v. Mayor*, 79 id. 511; *Corn Exchange Bank v. Nassau Bank*, 91 id. 74; *Hathaway v. County of Delaware*, 185 id. 368.) The court has not been aided by counsel on these questions, and we may well postpone their consideration until a record is presented requiring it.

The judgment must be reversed.

JENKS, HOOKER and GAYNOR, JJ., concurred; RICH, J., dissented.

Judgment reversed and new trial granted, costs to abide the event.

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CATHERINE BENDER, Appellant, v. PHILIPP PAULUS and WILHELMINE PAULUS, His Wife, Respondents.

Second Department, March 1, 1907.

**Will — when executors have power to sell although portion of devise invalid — heir takes subject to power of sale — equitable reconversion.**

Although a power of sale given to executors fails when the entire devise is invalid for lack of capacity of the beneficiaries to take, yet, when a portion of the devise is valid, the power of sale may be exercised in so far as it concerns the valid devise.

A person who takes as heir owing to the invalidity of a devise holds the property subject to any burdens necessary to the carrying out of the valid provisions of the will.

When, in order to execute that part of the devise which is valid, a sale of the whole property is necessary, the executors have authority to sell, and the heir who inherits by reason of the invalidity of a portion of the devise is entitled only to a proportion of the proceeds of the sale, which is impressed with its original character of real estate.

APPEAL by the plaintiff, Catherine Bender, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Queens on the 11th day of August, 1905, upon the decision of the court, rendered after a trial at the Queens County Special Term, dismissing the complaint upon the merits.

*Jacob F. Miller, Max Meyer and W. G. Phlippeau*, for the appellant.

*John E. Van Nostrand and E. V. B. Getty*, for the respondents.

Judgment affirmed, with costs, on the opinion of Mr. Justice WILMOT M. SMITH.

WOODWARD, JENKS, HOOKER, RICH and MILLER, JJ., concurred.

The following is the opinion of Mr. Justice WILMOT M. SMITH :  
SMITH, J. :

If the entire devise of the premises in question was invalid because of the lack of capacity of all the beneficiaries for whose benefit the

devise was made to take the same, there can be no question that the trust estate and power of sale given the executors would also fail, because the object for which these provisions of the will were made had failed. (*Jones v. Kelly*, 170 N. Y. 401.)

In the case under consideration a devise of a portion of the premises was valid, so that the trust estate and power of sale attempted to be created by the will, so far as they concerned the portion of the premises so devised, were valid.

A person who takes as heir at law premises which descended to him as intestate property by reason of the failure of the testator to make a valid disposition thereof by his will, takes such property subject to any burden imposed thereon by the necessity of carrying out to the best advantage the valid provisions of the will. (*Downing v. Marshall*, 4 Abb. Ct. App. Dec. 662.)

In *Jones v. Kelly* (*supra*) Chief Judge PARKER recognizes this principle in his opinion (at p. 409), where he says, "the real estate may be so situated as to require a sale of all of it in order to execute the valid portions of the will, and thus it will be turned into money in fact, but for the purposes of disposition under the statute as intestate property it will retain its character as real estate."

I must assume in this case, in the absence of evidence to the contrary, that the land in question was so situated as to require a sale of all of it in order to enable the executors to execute the valid devises of a portion of it to the best advantage of the devisees.

I, therefore, decide that the executors had authority to sell the whole premises in order to carry out the valid devises of a portion thereof, and that the plaintiff took the premises subject to the burden that such power of sale might be properly exercised, and that she is entitled only to her share of the proceeds of the sale, taking the same with its character as real estate unchanged by its conversion into money.

It follows that the complaint should be dismissed upon the merits, with costs.



In the Matter of the Application of ANTHONY ELDER, Respondent,  
for a Peremptory Writ of Mandamus against THEODORE A.  
BINGHAM, as Police Commissioner of the City of New York,  
Appellant.

Second Department, March 1, 1907.

**Mandamus — denials on information and belief — municipal corporations  
— judgment by police commissioner on trial had before predecessor —  
when mandamus proper remedy for reinstatement.**

The allegations of a petition on mandamus are not put in issue by denials made upon information and belief.

The action of a police commissioner in dismissing an officer is invalid if based upon proceedings had before his predecessor and not resulting in a final judgment.

Absence of an officer from duty when caused by act of God, as by illness, is not ground for dismissal under section 303 of the charter of Greater New York. To deprive an officer of his position, the absence must have been voluntary and intentional.

When no trial has been had before the police commissioner on the discharge of an officer, the latter's remedy for reinstatement is by mandamus.

APPEAL by Theodore A. Bingham, as police commissioner, etc., from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 14th day of November, 1906, granting a peremptory writ of mandamus commanding said appellant to restore the petitioner herein to duty as a patrolman in the police department of the city of New York.

*James D. Bell, Edward Lazansky and William B. Ellison,*  
*Corporation Counsel,* for the appellant.

*Jacob Rouss and Louis J. Grant,* for the respondent.

Order affirmed, with ten dollars costs and disbursements, on the opinion of Mr. Justice GARRETSON, at Special Term.

HIRSCHBERG, P. J., JENKS, HOOKER, GAYNOR and RICH, JJ.,  
concurred.

The following is the opinion of Mr. Justice GARRETSON:

GARRETSON, J.:

The denials and averments of the answering affidavit submitted by the defendant upon information and belief, do not put in issue the allegations of the relator's petition. (*People ex rel. Kelly v. Common Council*, 77 N. Y. 503; *People ex rel. Frost v. N. Y. C. & H. R. R. Co.*, 61 App. Div. 494; 168 N. Y. 187.) Hence the positive averment in defendant's affidavit that after he became police commissioner on January 1, 1906, upon the report of the police surgeons of February 6, 1906, and on March 19, 1906, he ordered that the petitioner "having been absent without leave for more than five consecutive days has ceased to be a member of the police force and has been dismissed therefrom in accordance with section 503, charter New York city\* from March 9, 1906," taken with the allegations of the relator's petition and particularly the allegation therein that the relator's absence was the result of personal illness and that he did not deem himself absent without leave because he believed that he had been reported ill, are the only facts essential for consideration upon the merits of this application.

It may be said, however, in passing, that the defendant's action so far as it is alleged to have been based upon the proceedings had before his predecessor was of no validity. He could not acquire jurisdiction over charges pending at the time he entered upon his office and which although tried, had not then passed to final judgment. (*People ex rel. Cassidy v. Roosevelt*, 7 App. Div. 144.) The facts appear, therefore, that the defendant assumed to declare relator's office vacant and dismissed him from the force solely for the reason that he was absent without leave for five consecutive days and the relator shows that during that time he was ill. Absence, under the section (503) of the charter \* (which is substantially the same as section 273 of the Consolidation Act)† which is caused by the act of God does not bring the penalty of dismissal upon the absentee. The absence that will deprive the officer of his place must be volun-

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\* *Sic.* See Laws of 1897, chap. 378, § 303, as amd. by Laws of 1901, chap. 466.—[REP.]

† See Laws of 1882, chap. 410, § 273, as amd. by Laws of 1884, chap. 180.—[REP.]

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tary and intentional. (*People ex rel. Mitchell v. Martin*, 143 N. Y. 407.) Certiorari is not the relator's remedy. No trial was had before the defendant. As the facts are undisputed the present proceeding is available to the relator and a peremptory writ should issue in accordance with the prayer of the petition. Motion granted, with fifty dollars costs.

LILLIE E. TAYLOR, Respondent, v. THE BANKERS' LOAN AND INVESTMENT COMPANY, Appellant.

First Department, March 8, 1907.

**Building loan association — withdrawal of member — right to interest.**

The articles of a building loan association allowed members to withdraw on written notice and provided that after the expiration of sixty days they should receive the book value of their shares if forty per cent of the dues received raised a fund sufficient for payment.

On the question of the right to interest of a withdrawing member there was no evidence showing the existence of a fund sufficient to pay the plaintiff except between August, 1893, and December, 1895, during which period dues were collected, a percentage of which was applicable to payment.

*Held*, that in the absence of proof bearing on the subject it should be assumed that payment was due December, 1895, and that interest did not run on the plaintiff's claim until January 1, 1896.

APPEAL by the defendant, The Bankers' Loan and Investment Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of October, 1906, upon the report of a referee.

*John C. Ten Eyck*, for the appellant.

*W. E. Kisselburgh, Jr.*, for the respondent.

PER CURIAM:

We are entirely satisfied with the conclusion reached by the referee as to the main question involved and would affirm the

judgment upon his opinion were it not for the fact that we think he erred in fixing the date from which interest should be allowed.

Under the provisions of article 15 of the association a member owning unpledged shares was entitled to withdraw upon giving written notice to that effect, and upon the expiration of sixty days after such notice had been given, to receive the book value of the shares, less certain things which were chargeable against them, but that no greater sum than forty per cent of the dues received in any one month should be applicable to the payment of the withdrawing member without the consent of the board of directors, and that withdrawing members should be paid in the order in which their notices of withdrawal were filed with the company, and if the amount of money on hand, applicable to the payment of withdrawing members was not sufficient to meet all claims of withdrawal within sixty days after the notice had been filed, then claims should not be deemed to be due until such time as forty per cent of the receipts from dues, subsequent to the time of filing of the notice, should amount to a sum sufficient to pay the book value of such shares.

The learned referee allowed interest on the amount which he found to be due the plaintiff from June 21, 1894, the date when the reorganization took place, but there is absolutely no proof that the defendant then had any funds applicable to the payment of the plaintiff's claim; on the contrary, the only proof bearing on that subject is that the defendant received for dues from August, 1893, to December, 1895, both inclusive, the sum of \$41,027.38 of which the forty per cent applicable for withdrawals under the articles of association amounted to \$16,410.94. Out of this fund thirty-one shareholders who had filed notices prior to the plaintiff and whose claims aggregated \$7,423.73 first had to be paid, and it is impossible to determine from the record when the fund was sufficient to pay the plaintiff, and in the absence of proof bearing on that subject it must be assumed to be at the end of the period during which it is stipulated the sum was accumulated, viz., December, 1895. Therefore, we think interest did not commence to run until January 1, 1896.

The judgment, therefore, should be modified by allowing interest on the principal sum which the plaintiff was entitled to withdraw,

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\$340, from January 1, 1896, and as thus modified the same should be affirmed, without costs to either party.

Present — PATTERSON, P. J., INGRAHAM, McLAUGHLIN, CLARKE and SCOTT, JJ.

Judgment modified as directed in opinion and as modified affirmed, without costs. Settle order on notice.

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DANIEL GREENWALD and Others, Respondents, v. GOTHAM-ATTUCKS MUSIC COMPANY, Appellant.

First Department, March 8, 1907.

**Partnership — action for accounting — when appointment of receiver and injunction against carrying on business unauthorized.**

There is no authority for the appointment of a receiver of partnership property unless the partnership is terminated, or there has been a breach of the agreement or other cause justifying a dissolution. During the partnership the business must be conducted by the partners and cannot be taken out of their hands unless facts be shown justifying a dissolution and a sale of the property. Hence, in an action by a partner to obtain an accounting by his copartner under the partnership agreement a receiver of the property cannot be appointed where neither a dissolution nor sale of property is asked.

Moreover, when under such circumstances a partner moves for the appointment of a receiver and there is nothing to show that the defendant has done, threatens or is about to do any act which will injure the plaintiff or render a judgment ineffectual or depreciate the value of the partnership property during the action, there are no grounds for an injunction restraining the defendant from carrying on the partnership business.

APPEAL by the defendant, the Gotham-Attucks Music Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of January, 1907, appointing a receiver *pendente lite*.

*Charles F. Brown* and *Benno Loewy*, for the appellant.

*I. N. Jacobson*, for the respondents.

McLAUGHLIN, J. :

The complaint in this action alleges that the plaintiffs are copartners, engaged in the business of publishing and selling musical compositions, which business is carried on under the name of The Morris-Harris Music Publishing Company; that the defendant is a domestic corporation; that on and prior to the 15th day of September, 1906, the plaintiffs owned a musical composition known as "He's a Cousin of Mine," and on or about that day they sold and assigned to the defendant an undivided one-half interest in the same in consideration of which it was agreed by and between plaintiffs and defendant that such composition was to be owned jointly by them; that all profits to be derived from such publication and sale were to be divided equally between them; that losses, if any were sustained, were to be borne in the same proportion; that statements were to be made of the receipts and disbursements each week, when settlements were to be made; that defendant published such musical composition and has made large profits therefrom, but has neglected and refused to make the statements or settlements according to the agreement; and the judgment demanded is that a receiver be appointed of the partnership property during the pendency of the action and that defendant be compelled to render an account in accordance with the agreement.

After the action had been commenced plaintiffs applied upon the complaint and an affidavit for the appointment of a receiver during the pendency of the action. The application was opposed, but notwithstanding that fact it resulted in the order appealed from, which appointed a receiver of "the publication and sale of the song 'He's a Cousin of Mine'" during the pendency of the action, and authorized the receiver during that time to publish and sell the composition; ordered and directed the officers, directors and agents of the defendant to deliver to the receiver the plates, books, memoranda, statements, papers and documents relating to the publication and sale of such composition and also restrained the defendant, its officers and agents from in any way interfering with the receiver in the sale of such composition.

The order appealed from must be reversed. There is no legal principle of which I am aware by which it can be sustained. The action is not brought for a dissolution of the partnership or for the

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sale of its property. There is no authority which justifies the appointment of a receiver of partnership property unless the partnership has been terminated or there has been a breach of the partnership agreement or other cause which justifies a dissolution. In case of the death of one partner, the survivor must wind up the business, pay the debts, and distribute the assets among those legally entitled thereto. During the lives of the partners the business must be conducted by them and cannot be taken out of their hands unless facts be shown justifying a dissolution and sale of the partnership property. Here, a dissolution and sale is not asked and, so far as appears, is not desired. What the plaintiffs want is an accounting and payment of whatever may be found due them, and not a fact is alleged which would justify even an inference that the defendant is not responsible or able to respond to any judgment which plaintiffs may recover. There is nothing in the moving papers to show that the defendant has done, threatened or is about to do any act which would injure the plaintiffs or render in any degree ineffectual a judgment which might be obtained, or during the pendency of the action injure or depreciate to any extent the partnership property. Under such circumstances a receiver could not be appointed, or the defendant restrained from carrying on the partnership business.

Before the defendant could be enjoined from doing that which the agreement gave it the right to do, the plaintiffs were bound to show that the defendant, unless restrained, would do some act during the pendency of the action which would produce injury to the plaintiffs or that it had threatened to do some act in violation of plaintiffs' rights, incident to or connected with the subject-matter of the action. (*Clark v. King & Brother Pub. Co.*, 40 App. Div. 405; Code Civ. Proc. § 603.)

Other errors are alleged but it is unnecessary to consider them.

The order appealed from must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

LEONARD G. KIRK, Appellant, v. BERNARD CRYSTAL, Respondent.

First Department, March 8, 1907.

**Sale—failure to file contract of conditional sale—mechanic's lien—election of remedies—when purchaser of premises not liable for conversion.**

The plaintiff installed a heating plant in a building under a conditional contract of sale providing that the title remain in the plaintiff until he was fully paid in cash. After the installment of the plant and before payment, the owner of the building conveyed the premises, and the plaintiff thereafter filed a mechanic's lien against whatever interest the former owner had in the premises. The purchaser of the property in his turn conveyed to the defendant, of whom the plaintiff demanded a return of the heating plant, and it being refused sued for conversion.

*Held*, that the complaint was properly dismissed because the contract of conditional sale had not been filed in the registrar's office until six months after the defendant had purchased the property without notice of the plaintiff's claim;

That although the plaintiff and the original owner could by agreement reserve the character of the heating plant as personalty, such agreement was not binding against a *bona fide* purchaser who took the plant as part of the realty without notice;

That as the plaintiff had filed a mechanic's lien against the interest of the original owner, it was inconsistent with his claim of title to the heating plant, and was an election of remedies;

That as the plaintiff had not complied with chapter 698 of the Laws of 1904, providing that every contract of conditional sale of chattels attached to a building shall be void against a subsequent *bona fide* purchaser of the premises unless the conditional contract be filed, the defendant in purchasing the property was justified in assuming that no claim of title would be made to the heating plant, especially so as a mechanic's lien therefor had been filed.

APPEAL by the plaintiff, Leonard G. Kirk, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of October 1906, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case on a trial at the New York Trial Term.

*James E. Duross*, for the appellant.

*Harold Swain*, for the respondent.



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McLAUGHLIN, J. :

On the 14th of August, 1903, the plaintiff entered into a written contract with one Liebeskind, who then owned a piece of real estate in the city of New York upon which he was erecting a six-story apartment, to install therein, for \$3,100, to be paid to him at times stated in the contract, a steam heating plant consisting, among other things, of a horizontal tubular boiler, pipes extending through the building, radiators in the different rooms connected with such pipes, valves and other appliances usual and necessary to properly heat the building, when completed, with steam. The contract further provided that the plant when installed was to remain the property of the plaintiff until fully paid for in cash. Plaintiff performed the contract on his part by installing the plant on or prior to May 18, 1904, but Liebeskind neglected to perform, in that he failed to pay the plaintiff \$1,538.93. On the 25th of July, 1904, Liebeskind sold the apartment house to one Kamsler, and on the eleventh of August following, plaintiff — not having been paid the balance due him under his contract — filed a notice of mechanic's lien against whatever interest Liebeskind had in the premises in question. On September 1, 1904, Kamsler sold the premises to defendant and plaintiff thereafter demanded a return of the heating plant, which was refused, and he thereupon brought this action for conversion of the same. At the trial the complaint was dismissed at the close of plaintiff's case, and he has appealed.

I am of opinion that the complaint was properly dismissed and that the judgment should be affirmed. The agreement between plaintiff and Liebeskind was not filed in the register's office until March 23, 1905, some six months after defendant purchased the property, nor was any proof given at the trial that defendant at the time he purchased the property had notice of the plaintiff's claim or any knowledge that the heating plant had not been paid for, other than the notice of lien filed against whatever interest Liebeskind had in the premises. The plaintiff and Liebeskind, as between themselves, could by agreement preserve the character of the heating plant as personalty. (*Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hubbard*, 75 id. 542; *Tyson v. Post*, 108 id. 217.) But this they could not do as against a *bona fide* purchaser or mortgagee who

never assented to nor had any notice of their arrangement. (*McMillan v. Leaman*, 101 App. Div. 436, and cases cited.) The defendant had no notice of the arrangement between plaintiff and Liebeskind and, therefore, as to him the heating plant was a part of the realty. The building could no more be used without heat than it could without light and water, and one would hardly contend that an apartment house six stories in height would be habitable without either. Besides, the plaintiff knew, when he installed the plant, the purpose for which it was intended and that it was designed to become a part of the building itself. There was present every element necessary or essential, once the plant had been installed, to change its character from personalty to realty; physical annexation of one to the other; adaptation to the use to which the realty was devoted, and an intent on the part of the plaintiff and Liebeskind to make a permanent improvement.

There is another view which I think requires an affirmance of this judgment. After Liebeskind had failed to make the payments provided and had sold the property to Kamsler, and before Kamsler had sold to the defendant, the plaintiff filed a notice of mechanic's lien against whatever interest Liebeskind had in the building and the land upon which it stood for the balance due him on the heating plant. The filing of this notice was the assertion of a claim irreconcilable and inconsistent with the one made in this action. That claim was predicated upon the fact that the title to the plant had passed from the plaintiff to Liebeskind, while here the claim is that title never passed but always remained in the plaintiff. Therefore, if it be held that at the time the notice of lien was filed the title was in plaintiff, and by reason of that fact he had an election whether he would take the plant or seek to recover its purchase price by acquiring a lien upon the real estate, he, by filing the notice of lien, made his election and was bound by it. (*White v. Gray's Sons*, 96 App. Div. 154; *Orcutt v. Rickenbrodt*, 42 id. 238; *Earle v. Robinson*, 91 Hun, 363; *affd.*, 157 N. Y. 683.) The choice of the selection of one remedy having been made and acted upon became final and the right to follow the other was forever gone. (*Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 id. 354.)

The statute (Laws of 1904, chap. 698, amdg. Lien Law [Laws of

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1897, chap. 418], §§ 112-115) would also seem to be a complete bar to the plaintiff's recovery. The act referred to took effect May 9, 1904, and some of the heating plant at least was put into the building subsequent thereto. This act provided that every contract for the conditional sale of goods and chattels, attached or to be attached to a building, shall be void as against subsequent *bona fide* purchasers or incumbrancers of the premises on which the building stands, and as to them the sale shall be deemed absolute unless, on or before the date of delivery of such goods or chattels at such building, such contract shall have been duly filed and indexed as directed in the act. The defendant, as we have already seen, purchased the premises on the 1st of September, 1904. The agreement had not then been filed as required by the act and he, therefore, was justified in assuming that no claim could or would be made to the heating plant or any part of it, and especially in view of the notice of lien which the plaintiff had then filed against the interest of Liebeskind.

It follows that the judgment appealed from should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, HOUGHTON and SCOTT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

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WILLIAM S. MURRAY, Respondent, v. INTERURBAN STREET RAILWAY COMPANY, Appellant.

First Department, March 8, 1907.

**Damages — negligence — verdict cannot be based on plaintiff's earnings in criminal employment.**

What a person earns by crime cannot be made a basis of damage for personal injuries occasioned by negligence.

Thus, in action for damages for personal injuries, it is error to refuse to instruct the jury that it cannot consider the plaintiff's earnings in placing bets for a bookmaker as a basis for damage, that occupation being unlawful.

APPEAL by the defendant, the Interurban Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff,

entered in the office of the clerk of the county of New York on the 6th day of April, 1906, upon the verdict of a jury for \$6,000, and also from an order entered in said clerk's office on the 27th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Henry A. Scheuerman*, for the appellant.

*Thomas D. Adams*, for the respondent.

**MCLAUGHLIN, J. :**

On the 11th day of September, 1902, between five and six o'clock in the morning, the plaintiff was a passenger on one of the defendant's south-bound Third avenue cars. He took the car at Forty-second street and as it approached Twenty-sixth street he testified he indicated to the conductor a desire to get off at that point; that, in obedience to the information thus imparted, the car was brought to a standstill at Twenty-sixth street, and while he was in the act of getting off it was suddenly started, he was thrown to the street, and one of the wheels of the car ran over his foot, cutting off three toes; that he was taken to the hospital, where he remained between five and six months, and thereafter was compelled for a period of some eight or nine months to use crutches; that from that time down to the time of the trial he had been unable to render the service which he did immediately prior to the accident. And in addition to the injuries complained of, he alleged by way of special damage that, prior to the accident, he was earning, in his occupation, seventy dollars a week, and which sum, by reason of his injuries, he had been unable to earn from the time of the accident to the time of the trial.

At the trial the plaintiff was permitted to prove, against the objection and exception of defendant, that immediately prior to the accident he was employed by a bookmaker at a salary of seventy dollars a week, and his duties consisted in placing bets on horse races, which work necessitated activity upon his part and at times he had to run from one bookmaker to another to ascertain the rates upon the horses, and to place the bets. In submitting the case to the jury, the learned trial justice was requested to charge that the jury could not take into consideration, for the purpose of fixing damages, the

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amount claimed to have been earned by the plaintiff while working for the bookmaker, inasmuch as that work was in violation of section 351 of the Penal Code, which prohibits gambling, betting, etc. The request was refused and an exception taken.

I am of the opinion there was sufficient evidence to go to the jury upon the question of defendant's negligence, as well as the contributory negligence of the plaintiff, but that the court erred in refusing to instruct the jury as requested by defendant's counsel that it could not consider, as fixing the amount of damage, the wages paid by the bookmaker to the plaintiff in placing bets. The plaintiff according to his own testimony was violating the law, and when a person is committing a crime he cannot use the wages paid to him for doing it as the basis for a recovery in a civil action. (*Riggs v. Palmer*, 115 N. Y. 506.) No one would contend that if a pick-pocket should have his hands cut off by the negligence of another that the amount which he realized in that pursuit prior to the injury could be used as the basis of damage, nor would any one contend that a burglar if injured by the negligent act of another, which prevented his following his criminal career, could use the amount which he had theretofore realized as the basis of a recovery, and yet in either instance they might just as well be resorted to as the evidence admitted in the case before us. In each case the person would be engaged in doing acts which the statute prohibits, and while they would be of different degrees they would be criminal nevertheless. What a person earns in committing a crime can never be used as the basis of a recovery for an illegal act inflicted by another. The law does not permit proof of its violation for the purpose of enriching the pockets of the violator.

It follows, therefore, that the exception to the refusal to charge as requested was well taken and the judgment and order appealed from must be reversed and a new trial ordered, with costs to appellant to abide event.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HENRY  
HUFFMAN BROWNE, Appellant.

First Department, March 8 1907.

**Practice — case on appeal — exceptions improperly stricken out.**

When an exception is taken to the court's refusal to charge, specifically and in the language requested, certain written requests submitted, and the court states that the requests will be given to the stenographer to copy in the record, a specific exception to the denial of each of such requests should not be stricken from the printed case upon the theory that the "exceptions" did not appear in the stenographer's minutes.

A case should be made up so as to state the truth as to what took place at the trial, and substance should not be sacrificed to form.

APPEAL by the defendant, Henry Huffinan Browne, from so much of an order of the Court of General Sessions of the Peace in and for the county of New York, entered on the 21st day of January, 1907, as denies in part the defendant's motion for a resettlement of the case on appeal.

*Clark L. Jordan*, for the appellant.

*E. Crosby Kindleberger*, for the respondent.

McLAUGHLIN, J. :

This appeal relates solely to a question of practice. The learned district attorney proposed certain amendments to defendant's proposed case on appeal, some of which were allowed, and thereafter defendant's counsel moved to resettle the case by restoring what had been stricken out. The motion to resettle was denied in part and he appeals from that part of the order.

At the beginning of the charge to the jury the trial judge stated that he had been asked by defendant's counsel to charge certain propositions, some of which he would charge and some of which he would not. Some of these propositions he charged and then stated: "I charge all these paragraphed requests that I have read. I shall decline all your other requests here, Mr. Chanler, except as I shall hereafter charge them." Thereupon the following colloquy between court and counsel took place: "Mr. Chanler: I take an

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exception to Your Honor's refusal to charge each and every request specifically, in the language requested, and does Your Honor wish me to read these requests out loud or not? The Court: No. Your requests are here before me. Mr. Chanler: Very well. They will be given to the stenographer and he will copy them in the record? The Court: Yes, sir." The requests referred to were not thereafter charged, except as to possibly some of them, in a qualified form, and nothing further was done with reference to them until the making of the proposed case on appeal, when these requests were inserted and after each appeared an exception to the ruling of the court. The amendments proposed by the district attorney complained of consisted in striking out these exceptions, and the motion to resettle was to have them restored, to the end that the case on appeal, when finally printed, would show that an exception was taken to the ruling of the court with reference to each one of them. The trial court, in the order appealed from, refused to restore them upon the ground, as appears from his memorandum, that such "exceptions" did not appear in the stenographer's minutes. But this is no reason why the case should not be made up so as to tell the truth. The facts are not disputed, and there cannot be any doubt as to what counsel intended nor but that the court understood his intention. It was to except to each refusal to charge in the language requested, and both court and counsel seem to have understood that the requests to charge, which had been refused, should go into the record with the exception which was taken. To permit the case on appeal to be printed in such a way that an appellate court can only determine what requests were charged by comparing the requests as made with the charge as made is not fair to the defendant nor to the appellate court. It is not a proper way to present what took place. The trial court knows whether or not he charged defendant's requests, and he is the one to indicate after each one of the requests as made whether charged, qualified, modified or denied. The purpose of a record on appeal is to tell precisely what took place at the trial in so far as alleged errors sought to be presented are concerned. To say, in view of what took place at this trial, that an exception was not taken to each refusal to charge, or to leave it in doubt because defendant's attorney did not, at the close of the whole charge,

specifically take an exception in each case, is to play upon words sacrifice substance to form, and sanction a practice which ought not to be tolerated.

Whenever it appears that an exception has been taken, or attempted to be taken, to an adverse ruling of which the court has full knowledge, the party against whom the ruling is made, if a record be thereafter made on appeal, should have the benefit of it. Courts usually look with disfavor upon technicalities and the law abhors them. The object to be attained in every legal trial, civil or criminal, is justice, and if injustice has been done, it certainly cannot be cured either by making or enforcing technical rules of practice.

For these reasons I think the order, in so far as appealed from, should be reversed and the motion granted.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed and motion granted. Order filed.

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GEORGE F. VAN SLYCK, as Receiver of the Corporation of J. F. SMITH & COMPANY, Respondent, v. WILLIAM R. WARNER, Individually and as Executor, etc., of WILLIAM R. WARNER, Deceased, and as Surviving Partner of the Firm of WM. R. WARNER & COMPANY, Appellant.

First Department, March 8, 1907.

**Receiver of corporation — action to set aside assignment of trade marks as in fraud of creditors — facts not showing fraud.**

Action by a receiver of a corporation to set aside transfers of trade marks and promissory notes upon the ground that they were made to hinder and defraud creditors and constituted an unlawful preference.

It appeared that the plaintiff's corporation was engaged in the sale of patent medicine under registered trade marks, the remedies being manufactured by the defendant to whom the corporation was indebted; that to secure the indebtedness and to procure a loan and further credit the corporation transferred promissory notes to the defendant with collateral security; that thereafter the unpaid notes were surrendered to the corporation and other notes secured by an assignment of the trade marks accepted; that thereafter the corporation's trade marks and business were sold to third persons subject to the defendant's lien, and that the purchaser paid the notes whereupon the trade marks were reassigned to him by the defendant.



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*Held*, that a judgment declaring the assignment void as made to hinder or defraud creditors was wholly unsupported by the evidence;

That the fact that it subsequently turned out that the corporation was insolvent did not of itself show that the assignments were made for the purpose of giving a preference prohibited by section 48 of the Stock Corporation Law;

That in order to bring the case within the statute it must be shown that the assignments were given and payments made by the corporation with the "intent" to giving preferences and because insolvency existed or was in contemplation;

That where the evidence is capable of an interpretation equally consistent with the absence of wrongful intent that meaning must be ascribed to it.

APPEAL by the defendant, William R. Warner, individually, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of May, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

The facts so far as the same are necessary to be considered on the question presented are as follows: On and prior to the 25th of March, 1899, J. F. Smith & Company, a domestic corporation, was engaged in the sale, under duly registered trade marks, of certain proprietary remedies which were manufactured for it by the firm of William R. Warner & Co., of which the appellant is the surviving member, and for which it was then indebted to such firm in the sum of about \$2,700; to secure the payment of this indebtedness and to procure a further credit of \$800, and a loan in cash of \$1,000 it proposed to assign and transfer to the firm 176 promissory notes of \$25 each, aggregating \$4,400 — together with certain collateral securing their payment — made by the firm of Baker & Berringer — one of such notes falling due each week thereafter; the proposition was accepted and then, or some time in April following, the cash was advanced and the notes and collateral transferred. The business between the corporation and the firm continued in the usual manner until the fifth of the following July, when the firm, at the request of the corporation, returned to it these notes (except such as had in the meantime been paid) together with the collateral accompanying them, and in place thereof accepted thirty-four notes of the corporation of \$125 each — one of which fell due on the fifth of each month thereafter, aggregating \$4,250 — the amount of the indebtedness then due, and for the purpose of securing payment

of these notes the corporation assigned the trade marks above alluded to. On the 28th of September, 1899, the corporation, for \$1,500 in cash, assigned and transferred to one Woodruff, subject to Warner & Co.'s lien, such trade marks, together with the formulæ for making the medicines. Warner & Co. were notified of the transfer and its terms, and Woodruff thereafter, either out of his own funds or from the proceeds derived from the sales of the medicines, paid the notes held by Warner & Co., when the assignment to it and the formulæ for the medicines were forwarded to him by express at St. Louis, where he resided. After the assignment to Woodruff he continued to manufacture the medicines and sell the same, through different agents, until the 30th of January, 1905, when he sold the trade marks, together with the formulæ, to J. F. Ballard of St. Louis, who continued the manufacture and sale of the medicines until about the time the judgment in this action was rendered. On the 27th of November, 1900, the plaintiff in this action, in sequestration proceedings, was appointed a receiver of the corporation, and in March, 1901, upon the theory that the transfer of the trade marks and formulæ to Woodruff was invalid, he applied to the court for leave to sell the same. Permission was given, and after such sale had been advertised for ten days the same was sold at public auction for \$100 to Howard H. Williams, who acted for the United States Security Company, to which a formal transfer was made. Williams is counsel for the receiver in this action. He was then the secretary of the Nassau Advertising Company, the principal creditor of the J. F. Smith & Company, and also an officer of the United States Security Company. Immediately following the sale to the United States Security Company, Williams, acting on behalf of the Nassau Advertising Company, caused to be organized a corporation known as the J. F. Smith & Co., Incorporated 1901, to which was assigned whatever right or interest was acquired by the United States Security Company at the receiver's sale, and also the claims which the advertising company had against the corporation of which the plaintiff is receiver, and these constituted its entire assets and capital. Shortly thereafter the J. F. Smith & Co., Incorporated 1901, brought an action against Woodruff to restrain his using the trade marks assigned and transferred to him on the 28th of September, 1899, by the J. F. Smith & Com-

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pany, and for an accounting. In the answer interposed by Woodruff he asked that the plaintiff in that action be restrained from using the trade marks and also for an accounting; the trial of that action resulted in a judgment on the 14th of April, 1904, which dismissed the complaint and restrained the plaintiff from using the trade marks and directing that it account to Woodruff for the medicines sold; at this time Williams was the attorney or counsel for the J. F. Smith & Co., Incorporated 1901, and also for the receiver—he testifying that their interests were identical; an appeal was taken by the corporation from the judgment against it, but instead of prosecuting that, it presented, on the 4th of May, 1904, a petition to the Supreme Court (in which the plaintiff in the action in which the receiver was appointed and the receiver himself joined) on which an order was made vacating and setting aside the sale of the trade marks by the receiver and restoring to him the title to the property sold; thereafter this action was brought to procure a judgment declaring invalid the transfer of the Baker & Berringer notes to Warner & Co., and the assignment of the trade marks, upon the ground that they were made with intent to hinder, delay and defraud creditors, and that they constituted an unlawful preference under the statute, and for that reason invalid, and to compel Warner & Co. to account for any and all moneys received by it on account of any indebtedness due from the J. F. Smith & Company on and after March 25, 1899; about the same time another action was brought against Woodruff to set aside the transfer of the trade marks to him, for a similar reason, and to compel him to account for all moneys received from the sale of the medicines covered by such trade marks; subsequently Ballard was made a party to the action and the assignment and transfer by Woodruff to him was also sought to be set aside for a similar reason, and to compel him to account; the action against Warner & Co. resulted in a judgment declaring the assignment of the Baker & Berringer notes and the trade marks to such firm invalid on the ground that the same were made with intent to hinder, delay and defraud creditors and constituted an unlawful preference, and directing defendant to account for any and all payments made to Warner & Co. for and on account of any indebtedness due from the J. F. Smith & Company to said firm on and after March 25, 1899; the judgment further provided that it having

been made to appear on the trial that \$4,250 had been paid to such firm after that day, judgment was directed against the defendant in favor of the plaintiff for such sum, together with interest from the date of the respective payments, \$1,721.25, making in all \$5,971.25; the action against Woodruff and Ballard resulted in a judgment declaring invalid and setting aside the assignment of the trade marks to each of them respectively because made with intent to hinder, delay and defraud creditors, and directing each of them to reassign such trade marks and to turn over all property which had come into their possession by reason of them, and also directing each of them to account to the plaintiff for all profits received, either directly or indirectly, in the business of manufacturing and selling the remedies covered by the trade marks, and enjoining and restraining each of them and their representatives from thereafter using such trade marks; each of the defendants has appealed and each has presented a separate record on appeal; the actions were practically tried together, were so argued or submitted on appeal and the evidence set out in each record is substantially the same; for this reason it has seemed best in stating the facts necessary to be considered on appeal from the judgment in this action to also state such as may be necessary to be considered on appeal from the judgment in the action against Woodruff and Ballard.

*Albert Francis Hagar*, for the appellant.

*Howard H. Williams*, for the respondent.

McLAUGHLIN, J.:

The judgment appealed from must be reversed. There is absolutely no evidence to sustain a finding that the assignment of the Baker & Berringer notes or the trade marks was made for the purpose of hindering, delaying or defrauding creditors or that the money paid to the firm of Warner & Co. on the indebtedness of the J. F. Smith & Company after the 25th of March, 1899, was paid with the intent of giving that firm a preference over other creditors. Warner & Co. had been dealing with the corporation for several years, during the course of which and on the 25th of March,

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1899, it was indebted to the firm in the sum of \$2,684.91 for medicines manufactured and sold. The corporation then wanted a further credit. It also wanted to borrow \$1,000. The firm gave the additional credit and loaned the money and to secure the payment of which, and for no other purpose, the Baker & Berringer notes were assigned. There is not a scintilla of evidence to show when this was done, that any officer of the corporation knew or had reason to believe the corporation was insolvent or its insolvency then imminent; on the contrary, if the testimony of one of plaintiff's witnesses is to be credited, some of the officers of the corporation believed its assets at that time were largely in excess of its debts. The Baker & Berringer notes were considered not only gilt-edge paper, but they also were accompanied by valuable collateral, and the fact that Warner & Co. on the fifth of July, at the request of the corporation, gave these notes and the collateral accompanying them back to it and received in exchange the corporation's own notes secured simply by the trade marks, indicates, if evidence indicates anything, that neither of the parties then believed that the corporation was insolvent or that it would be unable to pay the notes as the same fell due. The fact that it subsequently turned out that the corporation was on the twenty-fifth of March and thereafter continued to be insolvent did not in and of itself establish that the assignments of the notes and trade marks or the payments made were for the purpose of giving the preference prohibited by section 48 of the Stock Corporation Law (Laws of 1892, chap. 688). Something additional had to be proved, viz., that the assignments were given and the payments made by the corporation with the *intent* of giving a preference. There is not only no evidence to show intent, but all of the evidence bearing upon the transaction negatives it. Intent to prefer is a fact which must not only be alleged, but proved (*Curtis v. Leavitt*, 15 N. Y. 198) and it must be shown in addition that the assignment was made because insolvency then existed or was in contemplation. (*Paulding v. Chrome Steel Co.*, 94 N. Y. 334.) Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence. (*Lopez v. Campbell*, 163 N. Y. 340.)

Here, the evidence is not only capable of such construction, but any other would be contrary to evidence. After the transactions in March and April, of which the plaintiff complains, Warner & Co., as we have already seen, advanced to the corporation \$1,000 in cash and it did not thereafter receive from the corporation that amount in money, nor anything near like it. The Baker & Berringer notes were given back to the corporation; therefore, their assignment could not, by any possibility, have hindered, delayed or defrauded creditors, or given the firm a preference. After the assignment of the trade marks the corporation paid only two of its notes. It is true Woodruff, its assignee, thereafter paid the balance of them, but this is no concern of the plaintiff, so far as the defendant is concerned. If Woodruff, in making such payments used the proceeds derived from sales of the medicines covered by the trade marks, and plaintiff as receiver was entitled to the same, then he can look to him, and in this connection it must be borne in mind that he has pursued this course and now has a judgment against Woodruff, requiring him to account for such moneys. The payments made to Warner & Co. were made in the usual course of business and there was nothing in connection with any of them which indicates they were made in bad faith or for the purpose of giving that firm a preference over any other creditor of the corporation. Under such circumstances, if the payments made can be recovered by the receiver, then there is no safety in dealing with a corporation, if it should at any time thereafter turn out that at the time the dealings were had the corporation was insolvent. Obviously, this is not a proper construction of the statute.

The judgment appealed from, therefore, must be reversed and a new trial ordered, with costs to appellant to abide event.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

GEORGE F. VAN SLYCK, as Receiver of the Corporation of J. F. SMITH AND COMPANY, Respondent, v. MARTIN C. WOODRUFF and JAMES F. BALLARD, Appellants, Impleaded with JESSE W. SMITH and Others, Defendants.

First Department, March 8, 1907.

**Receiver of corporation — action to set aside assignment of trade marks as in fraud of creditors — facts not showing fraud.**

Where in an action by the receiver of a corporation to set aside an assignment of corporate property as being in fraud of creditors it appears that the assignee paid cash therefor and assumed the debts of the corporation, which had done a losing business, and that out of the sum received the corporation paid debts, a finding that the assignment was fraudulent is unwarranted even though the assignee sold the property for double the amount five years after his purchase. Moreover, the receiver of the corporation will not be heard to say that the assignment was fraudulent, if, having set aside the assignment in a prior action, he sold the same property at auction for a nominal sum. One who comes into a court of equity must come with clean hands.

A purchaser from the original assignee of the corporation who took the property with knowledge that the prior judgment setting aside the assignment had been reversed takes good title; especially so, when a search shows that his vendor's title had not been questioned for four years.

SEPARATE APPEALS by the defendants, Martin C. Woodruff and James F. Ballard, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of May, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

*Albert Francis Hagar*, for the appellant Woodruff.

*John H. Thompson, Jr.*, for the appellant Ballard.

*Howard H. Williams*, for the respondent.

MCLAUGHLIN, J.:

The facts necessary to be considered on the question involved in the appeal from the judgment in this action are stated in the opinion delivered in the case of *Van Slyck v. Warner* (118 App. Div. 40), decided herewith, and, therefore, it is unnecessary to restate them.

As to the judgment against Woodruff, there is absolutely no evi-

dence to sustain the finding that the assignment to him was made with intent to hinder, delay or defraud creditors, or to give him a preference over other creditors; on the contrary, the evidence would seem to indicate that it was made in good faith, for the sole purpose of enabling the corporation to pay its debts. The real consideration for the assignment was \$5,750 — that is, \$1,500 in cash and an agreement on the part of Woodruff to pay the indebtedness of the corporation to Warner & Co., \$4,250. The cash was paid at the time the assignment was made, and Warner & Co. was thereafter paid by Woodruff as the notes of the corporation fell due, either out of his own funds or the proceeds derived from the sales of the medicines covered by the trade marks. Out of the \$1,500 received by the corporation from Woodruff, it paid the Nassau Advertising Company \$500, which is at least significant, if it does not indicate that there was no intent on the part of the officers of the corporation by the assignment to hinder, delay or defraud creditors, or to prefer one over another.

But it is said the consideration paid by Woodruff was inadequate; that the trade marks were worth, at the time the assignment was made to him, at least \$20,000; and in this connection attention is called to the fact that four or five years afterwards Woodruff succeeded in selling the trade marks to Ballard for \$10,500. The profits of the corporation had never been large. The year preceding the sale to Woodruff the evidence indicates the net losses aggregated upwards of \$13,000, and for six years immediately preceding such sale the losses averaged nearly \$2,000 a year. But a much more significant fact bearing upon the question of value is that the trade marks were sold by the receiver at public auction (due and timely notice having been given of the sale) for \$100; that they were bid off by Williams, who is counsel for the receiver on this appeal, and who then represented the principal creditor of the insolvent corporation — the Nassau Advertising Company. If the consideration paid by Woodruff were inadequate, what shall be said of the sale made to Williams? And how can he, the Nassau Advertising Company, the J. F. Smith & Co., Incorporated 1901, or the receiver in this action justify their respective acts in permitting such sale to be made? That was considered a proper sale and no one thought of questioning it until the J. F. Smith & Co., Incorporated



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porated 1901, failed in its action brought against Woodruff. Then, for the first time, it seems to have dawned upon some one that the consideration paid by Woodruff was inadequate. Transactions of this character ought not, and rarely do, receive the sanction of the court and for the obvious reason that in an equitable action of this kind the person who asks equity must not only do equity, but must come into court with clean hands. If the trade marks, at the time of their assignment to Woodruff were, ever since have been, and now are of the value of \$20,000, then the receiver's sale — made at the instance of a favored creditor — of the same trade marks for \$100 was a gross fraud upon the corporation and its creditors. But the trade marks had no such value. The evidence indicates that Woodruff paid all, if not more than the same were worth — if the proceeds derived from the sales in the past were any indication as to what they would be in the future.

As to the judgment against Ballard — that also is without merit. The fact is not disputed that he paid Woodruff \$10,500 in cash, but it is urged he took the assignment from Woodruff with notice of plaintiff's claim. Having reached the conclusion that the assignment to Woodruff is good, it necessarily follows that the assignment from him to Ballard is good. However, it may not be out of place to call attention to the fact that there is no evidence that Ballard had notice of any claim by the receiver until after he had made the purchase. Before Ballard purchased he made a thorough investigation of Woodruff's title; the records of the Patent Office at Washington were examined; counsel was consulted with reference to the claim of J. F. Smith & Co., Incorporated 1901; Warner & Co., who had made the assignments to Woodruff, was interviewed, and other steps taken for the purpose of ascertaining whether the title which Woodruff had was good, or whether any one else had any claims against the trade marks, and as a result of his investigation he ascertained that the trade marks were sold to Woodruff on the 28th of September, 1899, more than a year before the receiver was appointed, and that for upwards of four years the receiver had not questioned his title. He also ascertained that the trade marks had been sold by the receiver at public auction and thereafter whatever title was acquired by the purchaser was assigned to the J. F. Smith

& Co., Incorporated 1901, which had brought an action against Woodruff to restrain his using such trade marks, and the trial of that action had resulted in Woodruff's favor, enjoining the corporation from using them.

Those, and the other facts developed at the trial, establish that Ballard acted in good faith and that the title acquired by him is good.

It follows, therefore, that the judgments against Woodruff and Ballard are reversed and a new trial ordered, with costs to appellants to abide event.

PATTEESON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgments against Woodruff and Ballard reversed, new trial ordered, costs to appellants to abide event. Orders filed.

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**JOHN BOGART, Respondent, v. THE NEW YORK AND LONG ISLAND RAILROAD COMPANY, Appellant.**

First Department, March 8, 1907.

**Contract—action by consulting engineer for services to railroad—power of president of railroad to direct performance of services—when such employment not inconsistent with office of director and secretary—affidavit as evidence.**

When a consulting engineer has been appointed by resolution of the directors of a railroad "at such compensation as the board may hereafter determine upon," the president of the corporation may authorize the actual performance of the services, when the by-laws provide that he shall be the chief executive officer of the company and shall supervise other officers and all departments of the road in every respect.

In order to warrant a recovery for such services it is only essential that they were within the line of services performed by consulting engineers and were directed to be performed by the president in good faith.

This is true although the engineer had previously been elected a director and secretary of the railroad, as by virtue of such office he was under no obligation to perform services as consulting engineer.

The railroad by paying a prior bill for similar services admitted its obligation to pay for like services thereafter rendered by authority.

The affidavit of the president of the railroad used in a motion for a bill of particulars which admitted that the services were rendered "for the defendant" is competent evidence against it.

INGRAHAM, J., dissented, with opinion.

APPEAL by the defendant, The New York and Long Island Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of May, 1906, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 10th day of May, 1906, denying the defendant's motion for a new trial made upon the minutes.

*George L. Kobbe*, for the appellant.

*George M. Pinney, Jr.* [*Aaron C. Thayer* with him on the brief], for the respondent.

LAUGHLIN, J. :

The action, as limited on the trial, was brought to recover the value of services rendered by the plaintiff, as consulting engineer, to the defendant during the period commencing in the month of October, 1901, and ending in the month of November, 1902. On the 25th day of April, 1895, plaintiff was appointed consulting engineer of the defendant by a resolution duly adopted by its board of directors, which, with respect to the compensation to be paid, provided as follows: "At such compensation as the board may hereafter determine upon." This appointment was never revoked, but no salary was thereafter prescribed for the position. Mr. Niven was president of the company from the 25th day of April, 1895, until the 11th day of April, 1904. The plaintiff had been a director of the company since the 12th day of December, 1889, and held twenty-five shares of stock of the par value of \$100 each, and he was elected secretary of the company in January, 1896. After his appointment as consulting engineer, and prior to the sixteenth day of December the same year, the plaintiff, at the request of the president of the defendant, performed services consisting of engineering advice and making plans and estimates for the route of the railroad which the defendant contemplated constructing under the East river, across Manhattan Island and under the Hudson river to the State line; and on that day he presented to the board of directors of the defendant a bill for \$2,000 for such services, which was approved and paid. On the 1st day of November, 1895, the board

of directors of the defendant, by a formal resolution, in effect declared its intention to construct a railroad from Casanova station, on the New York, New Haven and Hartford railroad, to the East river, near the junction of One Hundred and Forty-first street and the Southern boulevard, and thence under the East river to Lawrence Point in Long Island City on the line of Forty-second street, New York, continued, and thence under the East river to Forty-second street, and under Forty-second street to and under the Hudson river to the State line, with various branches therein described. There was no meeting of the board of directors after the month of January, 1896, until the 14th day of October, 1902. The plaintiff testified that during the period commencing in October, 1901, and ending in November, 1902, pursuant to the request of the president of the defendant, he formulated a plan to solve the engineering problem in connecting the proposed tunnel and railroad of the defendant with the Forty-second street terminus of the New York Central and Hudson River Railroad Company and the New York and New Haven railroad, and prepared and furnished plans, studies, tracings, profiles, drawings and explanatory documents for connecting the routes of the respective railroads at Forty-second street, and a profile plan of the tunnel under the East river; and that by direction of the president of the defendant he delivered them to Mr. Janney, a stockbroker, through whom it appears the president of the defendant endeavored to interest the New York Central Railroad Company in the plan; that this work consumed about thirteen months of his time and that he also employed draughtsmen in connection with it throughout the same period; that these plans embodied a scheme for depressing the tracks of the New York Central leading into the Grand Central Station and for a depressed or basement station "substantially such as has now been adopted and is now in progress of construction at that point," including a plan for making the change without substantially interrupting the traffic, and including plans for connecting the lines for passenger traffic and operating the cars by steam or electricity, which involved a study of the bed of the East river and the preparation of profiles thereof; that by direction of the president of the defendant, he had various consultations with Mr. Janney and with representatives of the New York Central and Hudson River Railroad Company, with

a view to having the plan approved and prepared detailed estimates of the cost of the entire work; that he had large experience as a consulting engineer; that the general duties of such an engineer are the preparation of plans, estimates and designs, and advising the executive officers of the company, and that his services were worth the sum of \$18,000. The plans were subsequently delivered by Janney to the president of the company, and so far as appears, it still has them. The plaintiff introduced in evidence a letter written by the president of the defendant to said Janney under date of May 2, 1902, as follows: "My Dear Sir.— In the matter of the plans for connections between the New York and Long Island Railroad and the railroads using the Grand Central Station, I would say that the Hon. John Bogart, as our Consulting Engineer and Acting Chief Engineer, has full power and authority to sign the plans on behalf of the New York and Long Island R. R. Co. and to agree with the engineers of the companies using the Grand Central Station upon all matters of engineering detail necessary or convenient in arranging a suitable operating connection. Whenever these plans have been agreed upon by the experts on both sides, I have no doubt the terms of a contract will be readily and promptly agreed upon. As President of the New York and Long Island R. R. Co. I am ready to take up the arrangement of a contract." Plaintiff also introduced in evidence an affidavit of the president of the defendant, used on a motion for a bill of particulars, showing that the company was formed in 1887; that in 1892 a construction company was formed and work was begun near the easterly terminus of the line as originally established in Long Island City, but a disastrous explosion occurred, resulting in many casualties and the construction operations were suspended and have not been resumed; that efforts have been made from time to time to finance the enterprise, but without success; that "in the year 1902 I requested him (meaning plaintiff) to formulate a plan or to solve the engineering problem involved in connecting the location of the defendant's proposed tunnel with the 42d St. terminus of the New York Central & Hudson River R. R. Co. and the New York, New Haven & Hartford R. R. Co. I am not aware of the extent of the plaintiff's services in that connection; I know the character generally speaking, for I saw their result embodied in a blue print ground

plan and profile. With that exception I am not aware of any services or any work done by the plaintiff for the defendant during the times mentioned in his complaint."

At the close of the plaintiff's case the defendant moved for a nonsuit, and upon the denial of the motion rested without offering any evidence either on the question of the employment of the plaintiff or the value of his services. Inasmuch as his testimony as to the value of his services might have been controverted, the jury were justified in accepting it, and the only question we are called upon to review is whether the defendant is liable. It is evident from the failure of the board of directors to meet, that the management of the business was left to the president, whose powers and duties, so far as material to the appeal, were defined by section 1 of article 8 of the by-laws, as follows: "The president shall be the chief executive officer and head of the company in all its operations, and shall supervise all other officers and all departments of the road in every respect." It is manifest that the services rendered by the plaintiff were essential to the development of the company. I am of opinion that it was fairly within the authority of the president to *direct* the plaintiff to perform those services. It is to be borne in mind that it was not essential that the president be clothed with authority to *employ* the plaintiff, for that had been previously done by the board of directors. It was merely essential that the services fell within the line of services to be performed by the consulting engineer and that they were in good faith directed to be performed by the president. It cannot be successfully maintained that by virtue of his relation as director and secretary of the company, the plaintiff was not entitled to charge for his services. (*Bagley v. Carthage, W. & S. H. R. R. Co.*, 165 N. Y. 181.) He was under no duty as secretary or director of the company to perform these services. The company by paying a bill for similar services, admitted that it was under obligation to pay the plaintiff for any like services thereafter rendered by authority. Moreover, I am of opinion that the affidavit of the president of the company, used by the defendant on a motion for a bill of particulars, and filed in this action, is evidence against the company that these services were rendered for the company, for it contains an admission that they were rendered "for the defendant," and having been used by

the defendant in the action it was competent evidence against it. (*Chicago & Northwestern R. Co. v. Ohle*, 117 U. S. 123; *National Steamship Co. v. Tugman*, 143 id. 28; *Trustees of Wabash & Erie Canal v. Bledsoe*, 5 Ind. 133.)

It follows that the judgment and order should be affirmed, with costs.

PATTERSON, P. J., CLARKE and SCOTT, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I dissent. When the plaintiff was appointed consulting engineer the resolution of the board of directors provided that it should be "at such compensation as the board may hereafter determine upon," and he accepted that appointment upon such terms. I think he impliedly agreed that the compensation for the services to be rendered under such appointment was to be determined by the board of directors, and that he was not entitled to recover from the defendant compensation for his services based upon a *quantum meruit*. Assuming that the president had the power to direct him to perform services for the company, such direction was not an employment of the plaintiff, but simply regulated the work that he was to perform as an officer or employee of the company under the appointment which he had accepted. He accepted the appointment without the salary being fixed, agreeing that it should be subsequently fixed by the directors, and not the president. As an employee of the company he performed services for the company, but the services that he performed were under his appointment by the board of directors, and his agreement with the company was that he should be paid such compensation as the board should fix. As he has never requested the board to act, and as the board has never fixed the compensation, I do not think he was entitled to recover. The action of the board in directing that he be paid for the services that he performed prior to the services in question was an act of the board under the power that it had reserved to itself to fix the plaintiff's compensation. It certainly was not an admission that he was entitled to recover the value of the services that he rendered in the future, without action by the board of directors.

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An entirely different question would be presented if the president of the company had employed the plaintiff to render services to the company, which services he had rendered and the company had accepted them, but where he was employed by the company at a salary to be fixed by the board it seems to me that he can only recover the amount of the salary or compensation thus fixed, and is not entitled to recover upon a *quantum meruit*.

Judgment and order affirmed, with costs. Order filed.

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PATRICK KEENAN, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

First Department, March 8, 1907.

**Negligence — injury to passenger by sudden starting of car — facts not showing negligence — evidence — damage — loss of wife's services — trial — improper comment by attorney.**

The plaintiff's wife in company with her son and daughter boarded an open car having running boards on the side. It appeared that the car was stopped at the signal of another passenger and that the son alighted but that the mother merely arose in her place and did not attempt to leave the car, when the sudden starting thereof threw her to the street. It also appeared that neither the daughter nor the mother caught the eye of the conductor although they endeavored to signal him to stop.

*Held*, that the evidence was insufficient to establish negligence on the part of the conductor in signaling the car to start, for he was justified in believing that the plaintiff's wife did not intend to alight.

When the plaintiff alleged only that he lost his wife's services as "housekeeper in my dwelling," he is not entitled to show that she assisted him in his occupation as janitor of adjoining houses, nor is he entitled to show that her illness necessitated the services of his daughters who had previously been earning money which they contributed to the family.

When the defendant's counsel on cross-examination interrogates a witness concerning a discrepancy between her testimony and the complaint filed by her in another action, it is improper for the plaintiff's attorney to state before the jury that he was responsible for the prior complaint which had been withdrawn. So too, it is improper for the plaintiff's attorney to go beyond the evidence and state that the defendant "has millions of capital" and "thousands of employees," etc.



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APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of March, 1906, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 19th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

*John F. McIntyre*, for the appellant.

*Robert L. Turk*, for the respondent.

LAUGHLIN, J. :

The plaintiff has recovered a verdict for \$1,000 damages, alleged to have been sustained in consequence of personal injuries to his wife, alleged to have been caused by defendant through the negligence of its servants in starting a car, which had been stopped at a point where passengers were customarily received and discharged, pursuant to her signal while she "was in the act of alighting therefrom." It is not clear from the manner in which the case was submitted to the jury that the verdict was rendered on the theory of negligence in starting the car while the passenger was alighting. The jury should have been instructed that it was incumbent upon plaintiff to show that the conductor knew, or, had he exercised reasonable care, would have known that the passenger desired to alight at that point, and if so, she should have been afforded a reasonable opportunity to alight, and if he did not, but signaled the car to start while she was in the act of alighting, then they would be justified in finding the company guilty of negligence. The jury may well have thought that even though the conductor did not know and should not have known that she wished to alight, yet that if the car was started with a jerk the company would be liable. If her conduct was such as to justify the conductor in inferring that she did not intend to alight there, he was not required to delay all other passengers by holding his car until she saw fit to sit down. She should either have remained seated or held on securely, or have made some move toward the running board, or given the conductor some notice that she was getting off as fast as she reasonably could. The evidence showed that the signal to

stop was not given by plaintiff's wife, but by her son; and it does not show that the conductor either knew or should have known that they were traveling together, or desired or intended to alight at the same point. It was, according to plaintiff's evidence, an open car with a running board at the side. Plaintiff's wife, her son and daughter boarded a cross-town car at Eighty-sixth street and Avenue A, and changed to a north-bound car at Lexington avenue, and again changed to a Lenox avenue car at One Hundred and Fifth or One Hundred and Sixth street. They contemplated alighting at Lenox avenue and One Hundred and Twenty-first street, west. It does not appear whether the fares were paid separately or by one for all, or whether each held a transfer or one held three; nor does it appear whether many passengers boarded the Lenox avenue car with them, so that the conductor would have known that they were traveling together. The accident happened about eleven o'clock at night. Plaintiff's wife, according to her testimony, was seated on the fourth seat from the front of the car and her son sat to her right and her daughter to her left on the same seat. The son alighted in safety before the car started, but she, according to her own testimony, either remained seated until *after it started* or made no move preparatory to alighting until *after it stopped*, and then merely arose in her place and remained standing firmly on both feet in the body of the car, with her left hand grasping the back of the seat in front, looking forward, without attempting to signal the conductor who was at the rear end of the car, when it started with a jerk and threw her down and off the car. She said on her direct examination: "My son got off first and after my son got off the car started and I raised up; the car started and threw me, and gave that jerk and threw me. I was standing facing the head or front of the car, just as I got up. I stood up and just put my hand like that on the front seat (indicating) as the car threw me. That was my left hand, on the seat in front of me. At the time the car gave this sudden start I was standing on the body of the car, on the platform. I was not on this running board. I never made no motion to get down. With my hand on the seat in front of me this car threw me." On cross-examination her testimony is practically the same; but she said that she did not remember whether her son remained seated until the car stopped; that

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after alighting he remained standing by the car to assist her off and that the car moved forward again at least five feet, and she could not say how much further before she was thrown off. The son was in Kansas at the time of the trial and his evidence was not taken. The daughter testified that she and her mother remained seated until after the car stopped, and that her brother arose but did not step down onto the running board until after the car stopped. She said that both she and her brother made an unsuccessful attempt to signal the conductor but could not get his eye, and later they endeavored to attract his attention again and he gave the signal to stop; but she does not say that he was looking at her, and in view of the fact that she made no move to arise until after the car stopped, it cannot be said that he saw any signal except that given by her brother, as testified to by her mother. Assuming that there was sufficient evidence that the car was negligently started while she was in the act of alighting, to take the case to the jury, which is doubtful, the weight of the evidence indicates that there was no negligence on the part of the conductor in signaling the car to start, for he was justified in believing that plaintiff's wife did not intend to alight at that point. She had not reached the running board or moved toward it. The conductor was toward the rear and she had given no indication to him that she contemplated alighting there, and in the circumstances I think her attitude was not sufficient notice. If he observed her, he may fairly have inferred that she was preparing to alight at the next street.

The plaintiff in his complaint specified that the services of his wife, which he lost owing to her injuries, and which he was obliged to employ others to perform, consisted of the "duties of housekeeper in their dwelling" which she performed for him and their family. Plaintiff and his wife and family resided at No. 168 West One Hundred and Twenty-first street, borough of Manhattan, New York. He was permitted to show, over objection duly interposed, that it was not within the issues, and exception, that his occupation was that of a janitor; that he was janitor of the house in which they resided and of No. 170, the next house, as well; that she assisted him in his occupation as janitor of those houses and that he was obliged to require alternately two of his daughters,

one of whom was over age, who were working out, earning and contributing to their father, one five dollars per week and the other three dollars and a half per week and board, to remain home nearly two years and perform the services which she had theretofore performed in connection with the janitorship of those houses, which consisted of cleaning and lighting the halls and the household duties as well. Plaintiff was thus allowed to prove damages not pleaded and also to give incompetent evidence as to damages properly pleaded. The loss of his daughters' earnings was neither recoverable nor proper proof of the reasonable value of the services of his wife.

On cross-examination of plaintiff's wife it appeared that she also had sued the defendant. Counsel for defendant, manifestly with a view to interrogating her concerning a discrepancy between her testimony and her original complaint in that action, which was subsequently amended, asked for the original complaint and plaintiff's attorney stated that her original action had been discontinued owing to an error in the complaint for which he was responsible, and after counsel for defendant pointedly objected, he persisted in repeating the statement. This was highly improper and calculated to prejudice the defendant in its right to cross-examine the witness without her being assisted by her counsel in explaining a verified declaration inconsistent with her testimony.

In summing up the attorney for plaintiff stated without any evidence in the record to justify it that the defendant "has millions of capital" and "thousands of employees" and had failed to produce a passenger who saw the accident, and dwelt unduly on the fact that the conductor did not give his right name on entering the employ of the company, and referred to him as "the man who committed a crime on entering that corporation."

There are other exceptions which might require serious consideration, but since for the conduct of plaintiff's attorney which was prejudicial to defendant, for errors in the reception of evidence on the question of damages already pointed out, for allowing a recovery on a theory different from that pleaded, and because the verdict, if rendered on the proper theory, is against the weight of the evidence, a new trial must be ordered, it is not deemed necessary to pass upon them, as they may be avoided on the next trial.

It follows, therefore, that the judgment and order should be

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reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

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MARY MURPHY, Appellant, v. DANIEL P. MURPHY, JR., as Administrator, etc., of ELLEN MORAN, also KNOWN as E. MORAN, Deceased, Respondent.

First Department, March 8, 1907.

**Contract — executors and administrators — action on alleged promise of decedent to make legacy in consideration of services.**

In an action upon an alleged contract by a decedent to make a specific bequest in consideration of services rendered, it appeared that the plaintiff, a cousin of the decedent, performed certain household services for her at various times and had furnished certain meals but no proof was given of the value of the services or meals, the plaintiff making no claim to recover on a *quantum meruit*. Although it was shown that the decedent had kindly intentions toward the plaintiff and had stated that she intended to leave her a legacy, the only proof that the promise was made in consideration of the services and board was the testimony of one witness who stated that the decedent told her "she had already promised" the legacy "for \* \* \* taking care of her and doing her work." On all the evidence,

**Held**, that the complaint was properly dismissed in that the evidence did not show that the alleged promise was not made after the services were rendered and hence was without consideration, and that if it were in consideration of future services it was too indefinite to afford a basis for action;

That the complaint being based on a specific contract and there being no proof showing the value of the services rendered, the plaintiff could not recover on a *quantum meruit*.

PATTERSON, P. J., and LAMBERT, J., dissented.

APPEAL by the plaintiff, Mary Murphy, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 30th day of April, 1906, upon the dismissal of the complaint by direction of the court

at the close of the plaintiff's case after a trial at the New York Trial Term.

*William J. Bogenschutz*, for the appellant.

*Francis J. Hogan* [*John McCrahon* with him on the brief], for the respondent.

LAUGHLIN, J. :

The plaintiff alleged that she performed certain household services for the decedent and furnished her board and household necessities, and advanced moneys to her at the request of the decedent and upon her promise to pay the plaintiff the sum of \$5,000 therefor by making a provision in her will for the payment thereof, but that the decedent died intestate, and judgment is demanded for the sum of \$5,000 upon the contract to pay that sum for the services, board and necessities furnished and moneys so advanced.

Plaintiff and decedent were cousins, but they did not live together. Upon the trial the plaintiff gave evidence tending to show that during a number of years she from time to time performed services for the decedent at the latter's apartment, and that the decedent quite regularly came to plaintiff's apartment and took breakfast with her, but she offered no evidence of the value of the services or board thus furnished other than evidence of declarations by the decedent tending to show that she intended at her death to leave the plaintiff \$5,000, or all of her property, in consideration for the services rendered and for plaintiff's attention and kindness to her. It is not alleged that \$5,000 was the reasonable value of the services rendered, board furnished, necessities provided and money advanced, and plaintiff did not claim to be entitled to recover on a *quantum meruit*.

Although in an action to recover on an express contract to pay a specified amount for services, a recovery may be had on a *quantum meruit*, it is not at all clear that that rule would apply in this case. The basis of this cause of action is an express contract by the decedent to leave the plaintiff a legacy of \$5,000 for services rendered, regardless of the extent or value thereof. It would seem, therefore, that the judgment herein would not be a bar to an action by the plaintiff for the value of the services rendered and board

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furnished, especially as the complaint is merely dismissed at the close of plaintiff's case and the judgment does not purport to be a dismissal on the merits. We are impressed by the evidence that some of the services, at least, were rendered under circumstances which would entitle the plaintiff to recover the reasonable value thereof. The nonsuit was apparently granted upon the ground that the plaintiff failed to show that the services were rendered pursuant to an agreement between the plaintiff and the decedent that the plaintiff was to be compensated therefor by a legacy of \$5,000, to be provided for in the will of the decedent. The preponderance of the evidence offered by plaintiff merely shows that the decedent contemplated making some suitable provision in her will to show her appreciation of the plaintiff's interest in her welfare as manifested by devoted attention and companionship and for services as well. At different times the decedent expressed to third parties her obligations to the plaintiff, and stated in effect that although only a cousin, she was more considerate than other cousins and relatives nearer in blood, and in fact that she was the only one who administered to decedent's wants and contributed to her comfort. On some occasions she stated that she intended to leave the plaintiff \$5,000, and on others she expressed an intention of leaving all her estate to the plaintiff. Only one witness called by the plaintiff gave testimony indicating that possibly *the services were performed* under an agreement that the plaintiff was to receive a legacy of \$5,000 therefor. This witness was Catharine Maher, who lived with the plaintiff and was her friend. The testimony of the witness shows that the conversation took place at the home of the decedent about two and one-half years prior to her death. She testified that the decedent told her "that she had already promised Mary Murphy \$5,000 for seeing to her and taking care of her and doing her work" and that the plaintiff was present at all conversations which she had with the decedent. The version she gave of this conversation on cross-examination was as follows: "Mrs. Moran told me that Mary Murphy was her old friend, the only one, the only cousin—or the only friend that would see to her and would take care of her, done her work, and she had promised her \$5,000. That is what Ellen Moran told me, she had promised Mary Murphy \$5,000." This evidence was inconsistent

with the other evidence offered by the plaintiff, which did not point to a promise made by the decedent to the plaintiff, but merely to the fact that the decedent intended to make some provision in her will for the benefit of the plaintiff. Moreover, the evidence of this witness, even if it were not inconsistent with the other testimony offered in her behalf, would not warrant a recovery, and the court was justified in declining to submit it to the jury. It does not show that the services to which reference was made were past or future services. If past services, the promise would be without consideration beyond the value of the services actually rendered. If it related to services to be rendered in the future, it is altogether too indefinite to afford a basis for a cause of action. Sufficient facts are not shown to enable the court and jury to determine whether or not the plaintiff accepted the promise and rendered the services in reliance thereon, or whether or not the services contemplated to be rendered were in fact fully rendered in accordance with the intention of the parties.

It follows, therefore, that the judgment should be affirmed, with costs.

HOUGHTON and SCOTT, JJ., concurred; PATTERSON, P. J., and LAMBERT, J., dissented.

Judgment affirmed, with costs. Order filed.

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THOMAS J. O'NEILL and JOSEPH A. SHAY, Copartners under the Firm Name of O'NEILL & SHAY, Respondents, v. CHRISTOPHER CAMPBELL, Appellant, Impleaded with JAMES QUINN, Defendant.

First Department, March 8, 1907.

**Attorney and client — action to enforce lien after settlement by client — maintenance — evidence insufficient to set aside retainer as invalid.**

An attorney's written retainer cannot be held to be invalid as procured by a promise to pay the client a valuable consideration in violation of section 74 of the Code of Civil Procedure, when the evidence does not show that the attorney's agent who procured the contract and who intimated that the plaintiff would receive help in his household expenses, made such promise before the retainer was signed or that the client was induced thereby to execute it.

INGRAHAM and LAMBERT, JJ., dissented, with opinion.



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APPEAL by the defendant, Christopher Campbell, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 29th day of May, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

*William J. Moran*, for the appellant.

*Thomas J. O'Neill*, for the respondents.

LAUGHLIN, J.:

The material facts are fully stated in the opinion of Mr. Justice INGRAHAM. It does not appear that the conversation between the client and the person who represented the plaintiffs in procuring the retainer, upon which it is sought to invalidate it, took place before the retainer was signed, or that the client was induced thereby to execute the retainer. I am of opinion, therefore, that the appellant failed to show facts sufficient to require an adjudication that the retainer was invalid.

It follows that the judgment should be affirmed, with costs.

PATTERSON, P. J., and HOUGHTON, J., concurred; INGRAHAM and LAMBERT, JJ., dissented.

INGRAHAM, J. (dissenting):

The complaint alleges that on or about June 21, 1905, the defendant, James Quinn, "by retainer in writing, retained and employed the plaintiffs to act as his attorneys and to institute on his behalf an action against the defendant, Christopher Campbell, to recover damages for personal injuries sustained by the said James Quinn on June 21st, 1905, while in the employ of the said Campbell, and did then and there agree with the plaintiffs that they, the plaintiffs, should receive fifty per cent of any settlement, verdict or recovery had in said action, and that plaintiffs should receive in addition thereto all the costs of the action recovered or to which the said James Quinn might be entitled;" that in pursuance of this retainer the plaintiffs, as attorneys for the said Quinn, commenced an action in the Supreme Court to recover damages for the personal injuries so sustained by Quinn; that on or about the 29th day of August, 1905, "the said defendants, wrongfully contriving and conspiring

to deprive these plaintiffs of their compensation for their services in said action under the agreement as aforesaid, did collusively and without the knowledge of the plaintiffs, settle the said cause of action so sued upon" for the sum of \$300. The relief demanded is that the plaintiffs be adjudged to have a lien upon said settlement and that they have judgment against the defendants for the sum of one-half thereof and for such other relief as the court may deem proper.

The defendant Campbell interposed an answer, which in substance was a general denial. The court found the facts as alleged in the complaint and awarded judgment for \$150 against the defendants.

One of the plaintiffs was examined as a witness and testified to the commencement of the action of Quinn against Campbell; of the service of a summons on the defendants, and the appearance of the defendant on September 18, 1905; the subsequent service of an unverified complaint, and the service of a verified answer by the defendant. Plaintiffs then called the defendant Quinn, who testified that he signed the retainer which was introduced in evidence.

The accident which caused the defendant Quinn's injuries was alleged in the complaint to have occurred on the 21st of June, 1905, and the alleged retainer was dated June 22, 1905. That instrument read as follows:

"I, James Quinn, aged 42, occupation bricklayer, the undersigned, of 310 E. 44th St., do hereby employ O'Neill & Shay, counsellors at law, to institute legal proceedings in my behalf against the proper defendant or respondent to recover damages sustained by me on or about the 21st day of June, 1905, and I do hereby agree with my said attorney to pay him fifty per cent of any settlement, verdict or recovery had in said action, and he in addition thereto to receive all costs recovered or to which they may be entitled. And I agree with my said attorney not to make any settlement unless they are present and receive their share in accordance with this agreement, and I do hereby grant to my said attorneys full power to act for me in bringing about a compromise or settlement of my case the same as if I were present.

"Dated NEW YORK, June 22, 1905.

JAMES QUINN.

"Witness:

"ROBT. R. ROCH,

"DAVID J. WIDRENTZ."

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Quinn further testified that he received \$300 in settlement of his action against Campbell and that he never paid anybody any part of it. On cross-examination the witness testified that he never saw either of the plaintiffs before the day of trial; that the circumstances under which he signed the paper were that an unknown person came to him the day he was injured and when he signed the paper asked him if he "needed anything for the house — would I need any money. I told him no, not at present, I had some money coming off a job. He (the unknown person) said 'all right, maybe within a week or so I will come around to see you.' I said 'all right, may be I will need some after this;'" that it was either seven or eight weeks after that before the witness saw anybody connected with the plaintiffs; that he never had any correspondence with them and was never in their office; that he was never asked to sign any paper other than the alleged retainer; that neither of the plaintiffs ever called upon him. On redirect examination he stated that he did not know anything about the date of the paper; that he signed it the day he was injured and knew he was employing a firm of lawyers. This is all the evidence in the case.

The only question presented is whether this instrument was a retainer which gave to the plaintiffs a lien upon Quinn's cause of action to recover for personal injuries. Section 66 of the Code of Civil Procedure provides that "the compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law." This plainly means an agreement which is recognized by the law as a valid agreement. An agreement obtained for a consideration which is invalid or upon inducement which is expressly prohibited would not be an agreement which was "not restrained by law." The relations between an attorney and his client are regulated by article 2, of title 2, of chapter 1 of the Code of Civil Procedure of which section 66 is a part, and the provisions of section 66 of the Code of Civil Procedure, which provides for an agreement not restrained by law, do not include an agreement which, by a subsequent provision, is made illegal or is prohibited. Such an agreement would be an agreement restrained by law. Section 74 of the Code of Civil Procedure provides that "an attorney or counsellor shall not by himself or by or in the name of another person, either before or after

action brought, promise or give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands or in the hands of another person a demand of any kind for the purpose of bringing an action thereon." And section 75 of the Code of Civil Procedure provides that an attorney or counsellor who violates section 74 is guilty of a misdemeanor. If this section, therefore, was violated or the execution of this instrument was obtained by the promise of a valuable consideration to Quinn as an inducement to place or in consideration of having placed in the hands of these plaintiffs this demand for the purpose of bringing an action upon it, it was an agreement which the law prohibited and was not a retainer within section 66 of the Code of Civil Procedure.

The rules of the common law in regard to the relations between attorney and client have been abolished in this State and the parties are left to determine the compensation of a lawyer by agreement. Such agreement, however, must comply with the further provisions of the Code of Civil Procedure. The right of the plaintiffs to recover from the defendant Campbell depends upon the plaintiffs having a lien upon Quinn's cause of action against Campbell which plaintiffs could enforce as against Quinn. When the person obtaining the execution of this retainer asked Quinn if he "needed anything for the house;" and upon Quinn replying that he did not need money at present, as he had "some money coming off a job," the person obtaining the agreement said, "all right, may be within a week or so I will come around to see you;" to which Quinn replied, "All right, maybe I will need some after this," there was, I think, a promise to Quinn to give him money if he needed it. Quinn does not testify that this promise was a consideration for his execution of this agreement, but it certainly was an implied promise to provide him with money if he needed it, made at the time the instrument was executed, and was a violation of section 74 of the Code of Civil Procedure.

So far as the enforcement of civil rights are affected, the plaintiffs, by accepting the benefits of the agreement and attempting to enforce it, adopted the representations and promises that were made at the time it was executed, and they are thus seeking to enforce an agreement which was obtained under circumstances which made the

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person procuring it guilty of a misdemeanor. The fact that the promise to give money was indefinite, the amount and time of payment not being fixed, and the conditions under which the payment should be made not settled, does not relieve the transaction from the condemnation of section 74 of the Code of Civil Procedure. It was an understanding that Quinn should receive a valuable consideration as an inducement to retain the plaintiffs to commence an action against his employer; a promise having for its object the inducing of Quinn to retain the plaintiffs as attorneys. I think an agreement thus procured is "restrained by law," and thus an agreement which gives no lien to the attorney upon his client's cause of action, and one that the court should not enforce. The object of making this promise is plain. It could have no other purpose than to induce Quinn to retain the plaintiffs, and if a promise obtained under such circumstances is enforced, a simple method is provided for evading the prohibition contained in section 74 of the Code.

It follows that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

LAMBERT, J., concurred.

Judgment affirmed, with costs. Order filed.

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DANIEL H. OLMSTED, Respondent, v. ELLEN A. OLMSTED, Wife of DANIEL H. OLMSTED, and Others, Respondents, Inpleaded with JOHN H. OLMSTED and WILLIAM H. OLMSTED, Appellants.

First Department, March 8, 1907.

**Husband and wife — conflict of laws — when foreign statute legitimatizing children on marriage of parents binding here.**

The statute of a sister State providing that where the parents of an illegitimate child intermarry, or if the father acknowledge the child as his by a written instrument, it shall be considered legitimate for all intents and purposes, is binding here and entitles a child so legitimatized to share in real estate with other legitimate children by a former wife, even though the second marriage of the father was made following a foreign divorce procured by him by publication, the validity of which would not be recognized by our courts.

Although, under the decisions of the Supreme Court of the United States, our courts can under certain circumstances refuse to recognize the validity of a foreign divorce, the rule should not be so extended as to refuse recognition of the legitimacy of children of a subsequent marriage who are legitimate where born or subsequently domiciled.

INGRAHAM, J., dissented, with opinion, on the ground that the legitimation of children cannot be effective to divest remainders already vested in other legitimate children.

APPEAL by the defendants, John H. Olmsted and another, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 2d day of August, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

*Mortimer W. Byers*, for the appellants.

*Charles H. Luscomb*, for the plaintiff, respondent.

*Read G. Dilworth*, for the defendants, respondents.

LAUGHLIN, J. :

This is an action by one of the sons of Benjamin F. Olmsted, deceased, for a partition or sale of real estate devised by the will of plaintiff's grandfather, Silas Olmsted, to the issue of his two sons, William F. and said Benjamin F., after the death of the survivor of them. The property was sold during the pendency of the action by the executor of said Silas Olmsted, pursuant to a power of sale contained in the will. The decision of the court from which the appeal is taken directs a distribution of the proceeds of the sale between lawful issue of said Benjamin F. and William F. Olmsted, pursuant to the provisions of his will. The court found that the lawful issue of said Benjamin F. Olmsted, entitled to his share, are his sons, the plaintiff and the defendants Clarence E. and Frank S. Olmsted and his daughter, the defendant Mary O. Olmsted, and that the appellants, who are the children of said Benjamin F. Olmsted and one Sarah Louise Welchman, are not the lawful issue of said Benjamin F. Olmsted, and are not entitled to share in the proceeds of the sale.

The facts are not in dispute. Benjamin F. Olmsted was lawfully married to Mary Jane Olmsted in this State on the 25th day of December, 1850, and the four children in whose favor the decree

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was made are concededly the lawful issue of that marriage. The matrimonial domicile appears to have been, although it is not so specifically shown, in the State of New York, and the wife remained a resident of this State until her death on the 22d day of January, 1902. It is evident that on or prior to the 28th day of February, 1874, Benjamin F. Olmsted removed to New Jersey, for on that date a ceremonial marriage was performed between him and Sarah Louise Welchman, the mother of the appellants, in that State, and the appellants were born to them there. During the summer of 1880 the father and mother of the appellants and their two children became residents of and permanently domiciled in the State of Michigan. On the 10th day of February, 1882, the Circuit Court for the county of Wayne in the State of Michigan, on the application of said Benjamin F. Olmsted, showing that he then was and for more than a year past had been a resident of that State, issued a subpœna to his wife, Mary J. Olmsted, to appear and defend an action brought by him for a divorce under the laws of Michigan, upon the ground of extreme cruelty and desertion. The subpœna was never served personally upon her, and on proof that she was not a resident and could not be found in the State of Michigan, but was a resident of the State of New York, service was ordered to be made upon her by publication, and was thereafter duly made according to the law of the State of Michigan. She was not served personally and she did not appear in the action; and after the service became complete the court on the 19th day of June, 1882, awarded judgment in favor of the plaintiff for the dissolution of the marriage. Thereafter, and on the 22d day of August, 1882, a ceremonial marriage was performed between the father and mother of the appellants in the State of Michigan, according to the laws of that State, and they thereafter resided together there until her death. In June, 1883, his wife Mary Jane commenced an action against him in the Supreme Court in this State for a decree of separation, and praying for alimony and counsel fees. The defendant did not appear on the trial of the action, and judgment was awarded in favor of the plaintiff on the 22d day of January, 1885, separating the parties from bed and board, and awarding her alimony. The judgment roll in that action shows that the defendant was represented by an attorney and counselor at law on a motion for the

sequestration of his property to pay the alimony awarded in the judgment, and from the order entered the defendant, by the attorney who appeared for him on the motion, appealed to the General Term, where it was affirmed in October, 1885. (38 Hun, 638.) Sarah Louise Welchman died on the 30th day of January, 1900, and Benjamin F. Olmsted died on the 16th day of July, 1905. An act was duly passed by the Legislature of the State of Michigan, approved by the Governor, and became of force on the 29th day of March, 1881, which provides as follows: "When, after the birth of an illegitimate child, his parents shall intermarry, or without such marriage, if the father shall, by writing under his hand acknowledge such child as his child, such child shall be considered legitimate for all intents and purposes: *Provided*, That such acknowledgment shall be executed and acknowledged in the same manner as may be by law provided for the execution and acknowledgment of deeds of real estate, and be recorded in the office of the judge of probate of the county in which such father is at the time a resident." (See Public Acts of Mich. of 1881, No. 55.)

It is unnecessary to state in detail the steps that were taken in the action by the father of the appellants for divorce in the State of Michigan, or to consider the statutes of that State under which the divorce was granted. It is sufficient to say that, *according to the laws of that State*, the court acquired jurisdiction and the divorce was duly granted, and the father of the appellants was competent to contract another marriage. Nor is it necessary to quote the statute or to state the facts with respect to his subsequent marriage to the mother of the appellants. That marriage was duly solemnized according to the laws of Michigan and was there valid. By virtue, therefore, of the statute quoted, the appellants thereby became legitimized in the State of Michigan. They contend that their status as the legitimate heirs of their father having thus been established by the law of the State of their residence and that of their parents, must or should be recognized by the courts of every other State of the Union. There is no doubt but that, as between Mary Jane Olmsted and the father of the appellants, under the decisions of the courts of this State he remained her husband as long as she lived, and neither the divorce nor subsequent marriage in Michigan would be recognized here. In the case of *Miller v.*



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*Miller* (91 N. Y. 315), prior to the enactment of any law in this State legitimizing children born out of wedlock upon the subsequent marriage of their parents, the Court of Appeals gave force and effect to such a statute of Pennsylvania and said, among other things: "The law-making power can declare a child born to be legitimate or illegitimate, and it is only that power which fixes and determines the status of children born. If born before marriage, the Legislature can remove the disability of its illegitimacy and by its transcendent power can legitimatize and make capable of inheriting the illegitimate child. (Blackstone, 4 Inst. 36.\*)" If this had been done by an act of the Legislature of the State of New York, no question could arise as to the legitimacy of the plaintiff or his right to inherit.

\* \* \* Legitimacy, which was conferred upon the plaintiff by the laws of Pennsylvania, to which reference has been had, constituted a portion of his rights, and accompanied him wherever he might reside. Being legitimate in the State of Pennsylvania, he continued so in every State and in every country where he chose to establish his residence." The declaration of the Court of Appeals in that case, that the status of legitimacy once created continues in favor of the child thus legitimized wherever he may choose to reside, states the well-recognized rule. (22 Am. & Eng. Ency. of Law [2d ed.], 1360; Story Conf. Laws [7th ed.], § 93; *Van Voorhis v. Brintnall*, 86 N. Y. 18.) The learned counsel for the respondents contend that it is essential to maintain the dignity of the decree of our own court that we should refuse to recognize the status of the appellants as fixed by the law of the State of Michigan, because it is based upon a divorce which would not be recognized as valid here. The Appellate Division in the third department (*Matter of Hall*, 61 App. Div. 266) held in a case not distinguishable on the facts from the one now at bar, that the legitimacy of children once established under the law of any State or country should be recognized by the courts of this State. We are of opinion that the conflict in the law of divorce between the different States and Territories has gone to the extreme limit and that the status of the parents as husband and wife in one State, and as divorced in another, should not be visited upon the innocent offspring of the succeeding marriages. The conflict and confusion has arisen over the fact that

\* See 1 Black Comm. 459; 4 Coke Inst. 36. — [REF.]

the public policy of one State, manifested by the acts of the Legislature, has not favored the granting of divorces on as many grounds as are permitted in other States, and, therefore, the courts of the one State, while asserting their own jurisdiction to grant divorces without appearance or personal service and upon service by publication, and without inquiring into the matrimonial domicile, have refused to recognize the decrees of sister States granted on like service and in accordance with the laws of their jurisdiction, and the authority of the courts of one State to refuse to recognize the validity of a divorce in a sister State upon service by publication and without appearance, has been sustained by the Supreme Court of the United States, where there was not a matrimonial domicile in the State in which the divorce was granted. The right of the courts of one State to refuse to give full faith and credit to the decisions of the courts of another State, as required by the Federal Constitution,\* is placed by the United States Supreme Court upon the ground that each State is authorized to declare and protect, within its jurisdiction, the status of its own citizens, and that although according to the foreign law the courts of the sister State obtained jurisdiction, yet the courts of another State may in the interest of their own citizen, who was a party served only by publication or without the State and who did not appear, institute an inquiry as to the matrimonial domicile, and if not found to have been in the State where the decree was obtained, may regard the decree void upon the ground that the court did not obtain jurisdiction either over the person of the defendant or over the subject-matter of the litigation. (*Haddock v. Haddock*, 201 U. S. 562; *Andrews v. Andrews*, 188 id. 38.) That rule, however, should not be extended to the children of a subsequent marriage who are legitimate where born or subsequently domiciled.

The material facts are stipulated and could not be changed upon a new trial. It follows, therefore, that the decree should be modified by providing that the appellants are the legitimate issue of said Benjamin F. Olmsted and entitled to share equally with his other children and by awarding them costs, and as so modified it is affirmed, without costs of this appeal.

PATTERSON, P. J., CLARKE and SCOTT, JJ., concurred.

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\* See U. S. Const. art. 4, § 1.—[REP.]

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INGRAHAM, J. :

The question presented in this case is not as to the legitimacy of the children of Benjamin F. Olmsted, born after a marriage which was valid in the State of Michigan, but whether two children of Benjamin F. Olmsted, who were concededly illegitimate, were legitimized by the subsequent marriage of their parents in the State of Michigan. It is conceded that these children when born were illegitimate. It is also conceded that the divorce obtained by Benjamin F. Olmsted in Michigan was not effective to dissolve the marriage relation with his wife, who was a resident of this State, so that in this State Benjamin F. Olmsted had a wife entitled to be recognized as such, and her children, the legitimate children of Benjamin F. Olmsted, had a vested remainder in the property to partition which this action is brought. No subsequent marriage of Benjamin F. Olmsted during the life of his wife, unless he was divorced by a judgment which was recognized in this State, could be effective to divest the legitimate children of Benjamin F. Olmsted of the property that had vested in them. Assuming that a legal marriage of Olmsted, when he had capacity to contract a marriage, would legitimize his illegitimate children, it seems to me that where the title to real property in this State is affected, such a marriage must be one which is valid in this State or would be recognized by the laws of this State.

The property in question is property in which Benjamin F. Olmsted had a life estate, with a remainder that vested in his children. When Olmsted removed from this State he left here a wife and children in whom this remainder had vested. The action for divorce against his wife was not effective to dissolve the marital relation, and his wife, therefore, remained until her death his only lawful wife, and the issue of that marriage his only legitimate children. During the life of his wife he was incapable, according to the law of this State, of contracting another valid marriage, and his contracting a marriage which was invalid according to the law of this State could not, I think, have the effect of legitimizing children who were concededly illegitimate so as to divest his legitimate children of property that had vested in them. Whether these children would be legitimized in Michigan by virtue of the law of that State does not seem to be material. The case of *Miller v. Miller*

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(91 N. Y. 315) presents an entirely different question. There was no impediment to the marriage of the parents in that case, and the parents of the illegitimate child having contracted a valid marriage which, by the law of their domicile at the time of such marriage, legitimized the child, it was held that the child, having become legitimate according to the law of the domicile of the parents at the time of the marriage, would here be regarded the same as if born after the marriage. There was no question in that case of divesting the children of one of the parents of the illegitimate child of property that had vested before the alleged marriage, the question arising as to real property acquired subsequent to the alleged marriage by the father as to which he died intestate.

It seems to me that as the parents of the appellants could contract no lawful marriage which would be recognized in this State at the time of the alleged marriage, the effect of which it is claimed legitimized the appellants, the appellants were not legitimized in this State, and I think, therefore, the judgment was right and should be affirmed.

Judgment modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

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SOLOMON SCHINASI and MOSES SCHINASI, Respondents, v. ROBERT E. LANE, Appellant.

First Department, March 8, 1907.

**Guaranty — contract construed.**

The defendant being a stockholder and president of a domestic corporation, guaranteed parties selling goods to his corporation the payment of any bills "unless I notify you to the contrary, providing the amount of the credit shall not exceed \$5,000 at any one time."

*Held*, that the defendant did not intend by his contract to deprive his corporation of obtaining a credit above \$5,000, but intended merely to limit his liability to that sum;

That if a contract of guaranty drawn by the guarantor be ambiguous it will be interpreted most strongly against him;

That words of limitation in a guaranty are to be construed as limiting the liability of the guarantor, and not as a condition as to the extent of credit to be given, a breach of which will release him.

INGRAHAM, J., dissented, with opinion.

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APPEAL by the defendant, Robert E. Lane, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 6th day of July, 1906, upon the decision of the court rendered after a trial at the New York Trial Term without a jury.

*William J. Leitch*, for the appellant.

*Frederick Wiener*, for the respondents.

LAUGHLIN, J.:

The plaintiffs were copartners engaged in manufacturing and selling cigarettes. The defendant was a stockholder and president of the Retail Cigar and Tobacco Dealers' Association of New York, a domestic corporation. With a view to inducing the plaintiffs to give credit to his company, after negotiations between the parties, the defendant wrote, signed and delivered to the plaintiffs a guaranty as follows:

"NEW YORK, April 29th, '05.

"MESSRS. SCHINASI BROS.,

"Present:

"DEAR SIRS.—I hereby guarantee any bills the Retail Cigar and Tobacco Dealers' Association of New York may contract with you from this date, until January 1st, 1906, unless I notify you to the contrary, providing the amount of credit shall not exceed \$5,000.00 at any one time.

"Respectfully,

"(Signed) ROBERT E. LANE."

Prior to the giving of the guaranty the plaintiffs had sold the company cigarettes on credit. After the execution and delivery of the guaranty and prior to the 1st day of January, 1906, the total credit extended to the defendant by the plaintiffs at times exceeded \$5,000, but no single sale aggregated that sum. On the 2d day of January, 1906, there was due and owing to the plaintiffs from the company for merchandise sold and delivered to the company on the faith and credit of the guaranty the sum of \$3,200.67. The plaintiffs have recovered in full that amount together with interest.

The learned counsel for the appellant insists that the defendant is relieved from liability on the guaranty merely because at differ-

ent times after the execution and delivery of the guaranty and prior to the 1st day of January, 1906, the total amount of credit extended to the company by the plaintiffs exceeded \$5,000. This is not the true construction of the guaranty. The defendant did not intend by his contract of guaranty to deprive his company of obtaining credit. He merely intended that his liability should not exceed \$5,000. The language in which the guaranty was made was general, and but for the clause with respect to the \$5,000 would have rendered defendant's liability unlimited. As president of the company he could exercise supervision over the extent of its purchases. He did not intend to obligate the plaintiffs to protect him as a stockholder by their contracts with his company. The contract does not require a construction that it was intended as anything more than a guaranty. The construction contended for by the appellant reads into the guaranty a contract on the part of the plaintiffs that they would not extend credit exceeding \$5,000 at any one time. There is nothing to show that defendant deemed a greater credit injurious to the company or that he meant to exert through this contract of guaranty a controlling supervision over the indebtedness of the company. So far as the guaranty is concerned, especially in view of the defendant's relations with his company, it is evident that he merely intended to limit his liability to \$5,000. The contract, having been drawn by the defendant, should if necessary to protect the plaintiffs and accomplish the object of the guaranty, be interpreted most strongly against him if it be ambiguous. The interpretation for which he now contends would make the contract misleading, and is not the understanding that an ordinary person would glean from reading it. The guaranty remained in force and the amount of credit at the time the action was brought was less than \$5,000. I am of opinion that the defendant is clearly liable therefor. Even if we were not aided by the fact that the defendant was president of the company to which credit was to be extended, the general rule is that such words of limitation in a guaranty are to be construed as intending to limit the liability of the guarantor, and not a condition as to the extent of credit to be given, the breach of which would release the guarantor. (*Rindge v. Judson*, 24 N. Y. 64; *Tootle v. Elgutter* 14 Neb. 158; 45 Am. Rep. 103; *Curtis v. Hubbard*, 6 Metc. [Mass.]

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186; *Laurie v. Scholefield*, L. R. 4 C. P. 622; *Clagett v. Salmon*, 5 Gill. & Johns. [Md.] 314; *Pratt v. Matthews*, 24 Hun, 386; *Parker v. Wise*, 6 M. & S. 239.)

It follows that the judgment should be affirmed, with costs.

PATTERSON, P. J., HOUGHTON and LAMBERT, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

The defendant's contract was to guarantee "any bills the Retail Cigar and Tobacco Dealers' Association of New York may contract" with the plaintiffs from April 29, 1905, to January 1, 1906, with a proviso that the amount of credit should not exceed \$5,000 at any one time. I think the defendant had the right to impose conditions upon which his liability should depend, and it seems to me that he did impose as a condition that the credit extended to the association should not exceed \$5,000. It is not a limit of the amount of guaranty, but a condition upon which the guaranty is to be effected. The evidence is that on January 6, 1906, the total credit extended to the association was \$5,200.67. Subsequently, on January 10, 1906, the association paid \$2,000 on account, but the condition upon which the defendant was willing to guarantee the payment of bills of the association was broken by the plaintiffs extending credit to an amount exceeding \$5,000, and I think the defendant was relieved from liability.

The case of *Farmers & Mechanics' Bank v. Evans* (4 Barb. 487) is in point, and what was said in that case I think applies here: "It appears to me that the defendant intended to restrict the whole amount of the indebtedness of I & K at any one time, to the plaintiffs, to \$5,000. He contemplated that I & K would from time to time require money in their business, and he was willing to become responsible for any sums which the plaintiffs should loan them, provided the whole amount should not at any one time exceed \$5,000. He was unwilling to become surety for I & K to the extent of \$5,000 in case they were permitted to incur a larger debt at the bank. He may have had good reason for imposing this restriction. There are many men very competent to manage a small business successfully, who, when their business is extended, and large liabilities are incurred, become entirely incompetent to its

successful management. \* \* \* However this may be, the defendant had a right so to reason, and he had the right, with or without reasons, to prescribe the terms, and to say when and under what circumstances, he would become liable to the plaintiffs as the guarantor of I & K, and if the plaintiffs have not brought themselves within those terms, he is not liable. This is not a case where the guarantor is liable for a certain limited sum, although the whole amount of the credits or indebtedness may be much larger."

In the cases relied on by the plaintiffs the terms of the guaranty were different, and I do not think they are in point.

I think the judgment should be reversed.

Judgment affirmed, with costs. Order filed.

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CATHERINE H. WARD, as Administratrix, etc., of JOHN H. WARD,  
Deceased, Respondent, v. TERRY & TENCH CONSTRUCTION COMPANY,  
Appellant.

First Department, March 8, 1907.

**Practice — amendment of pleading to state true name of defendant corporation — payment of costs required.**

The plaintiff brought an action to recover for death by negligence, naming the defendant as the "Terry and Tench Construction Company." On a motion to amend the summons and complaint by striking out the word "construction" it appeared that the real name of the defendant which had employed the decedent was the "Terry and Tench Company," a domestic corporation, which occupied the same office and continued the same line of business and had the same officers and stockholders as a company called the "Terry and Tench Construction Company," which had become financially embarrassed and gone into the hands of a receiver. It also appeared that the vice-president of the corporation served was the vice-president of both corporations.

*Held*, that under the circumstances an amendment of the summons and complaint so as to designate the real defendant should be allowed;

That the defendant having answered and having notice which corporation was intended to be sued was not prejudiced by the amendment which should be granted in furtherance of justice;

That under the facts disclosed the case was not brought within the rule that defendants cannot be substituted by amendment;

That as the plaintiff's error was not based upon any erroneous information given by the defendant prior to the commencement of the action the amendment should be conditioned upon the payment of costs.

SCOTT and CLARKE, JJ., dissented, with opinion.



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APPEAL by the defendant, the Terry & Tench Construction Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of November, 1906, authorizing the service of an amended summons and complaint, amending the name of the defendant by striking out the word "Construction" so that the name of the defendant is changed from the Terry & Tench Construction Company to the Terry & Tench Company.

*William J. Moran*, for the appellant.

*Charles Caldwell*, for the respondent.

LAUGHLIN, J. :

This is a statutory action to recover for the death of John H. Ward, alleged to have been caused by the negligence of the defendant. The original complaint alleges that the decedent was in the employ of the defendant and was killed on the 29th day of July, 1903, while engaged in the construction of a power house at Fifty-ninth street and Eleventh avenue in the borough of Manhattan. The plaintiff alleged that the defendant was a corporation; that the decedent was in its employ in the due performance of his duties at the time of receiving the injuries which resulted in his death, and that the notice required by the Employers' Liability Act (Laws of 1902, chap. 600) was duly served. The defendant admitted its incorporation and the receipt of the notice, but denied all of the other material allegations of the complaint, and alleged, upon information and belief, that the injuries sustained by the decedent were caused by his own negligence or by the negligence of his fellow-servants, "or by the negligence of some third person or persons over whom this defendant had no authority or control," and that "all the risks and dangers connected with the situation" were open, obvious and apparent, and were known to and assumed by the decedent. The plaintiff thereafter discovered that the corporate name of decedent's employer was incorrectly specified in the title of the action and moved to amend. The moving papers show that the name of the corporation by which the decedent was employed and which was intended to be sued herein, was the *Terry & Tench Company*, and not the Terry & Tench Construction Company, as originally designated; that the

Terry & Tench Company is a domestic corporation and was incorporated on the 18th day of June, 1903, and occupied the *same office and continued the same line of business* as a domestic corporation incorporated under the name of the *Terry & Tench Construction Company* in the year 1900, *which became financially embarrassed and ceased doing business a month or two prior to the incorporation of the Terry & Tench Company* and went into the hands of a receiver in May, 1906; that the summons and complaint were served upon Frederick Tench, who was vice-president and treasurer of the new company and was also vice-president and treasurer of the old company; that the capital stock of the old company consisted of 500 shares, and that Edward F. Terry and Frederick Tench each owned 245 shares and one Shoemaker owned the remaining 10 shares; that the capital stock of the new company consisted of 750 shares and that said Terry and Tench each owned 250 shares and one Muller owned the remaining 250 shares; that both companies were insured by the same accident insurance company and represented by the same attorneys. I am of opinion that these facts bring the case within the rule which authorized the court at Special Term to allow an amendment to correct a misnomer of a party defendant. Service was made upon an officer of the new company, who also happened to be officer of the old company. It does not appear that the decedent had any relations with the old company. It is manifest that the plaintiff intended to sue the company in whose employ the decedent was, and Tench as an officer of each had knowledge from the facts alleged in the complaint that such was the plaintiff's intention. He knew that the old company had ceased to do business and that the new company was virtually its successor continuing the same line of business at the same place. The answer, in setting up the contributory negligence of the decedent and the negligence of his fellow-employees was calculated to mislead the plaintiff, unless it was intended as a recognition that the action was brought against the company which employed the decedent. The defense of the action for the old company merely required a denial of the employment of the decedent, for if he was not in its employ it was wholly immaterial to the defense whether the decedent or any of his fellow-employees was guilty of contributory negligence. If the plaintiff cannot now obtain this amendment it may be that

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the Statute of Limitations has run against the action. The new company having thus had notice that it was the party intended to be sued cannot be prejudiced by allowing the amendment, and since the plaintiff may be seriously prejudiced the motion should be granted in furtherance of justice if it is competent for the court to allow the amendment. It appears that the plaintiff was not aware that there were two corporations with names identical, except that the new company dropped the word "Construction," one of which had gone out of business and was succeeded by the other without change or notice to the public other than filing the certificate of incorporation. In these circumstances I think it is quite immaterial that there was in existence an old company having the corporate name by which the plaintiff originally designated the defendant. On the facts disclosed that circumstance is not sufficient to bring the case within the rule that you cannot by an amendment strike out the name of one party and substitute another defendant in his place. The plaintiff never intended to sue the old company. The old company had nothing to do with the accident. She intended to sue the company which employed the decedent and the complaint gave notice to the defendant through its vice-president and treasurer, upon whom the service was made, that such was the fact. Of course, if service had not been made on an officer of the new company, and if the new company through its officer had not been informed of the facts so that it had notice that it was the party intended to be sued, the amendment could not have been properly allowed. Service was made upon the right party, and the new company, through its officer upon which service was made, and which was the employer of the decedent, had notice from the allegations of the complaint that it was the party intended to be sued. The case is precisely the same as if there had been no old company, and the plaintiff made a mistake in the corporate name of the new company. Authority to allow an amendment to correct such a misnomer is conferred by section 723 of the Code of Civil Procedure and by the decisions of the courts made thereunder. (*Munzinger v. Courier Co.*, 82 Hun, 575; *Tighe v. Pope*, 16 id. 180; *Boyd v. U. S. Mortgage & Trust Co.*, 84 App. Div. 466; 94 id. 413; *Alker v. Rhoads*, 73 id. 158; *Kerrigan v. Peters*, 108 id. 292; *Reilly v. World Publishing Co.*, 14 N. Y. St. Repr. 390;

*Abbott v. Jewett*, 25 Hun, 603; *Dean v. Gilbert*, 92 id. 427; *Evoy v. Expressmen's Aid Society*, 51 N. Y. St. Repr. 38.) I think the decisions in *New York State Monitor Milk Pan Assn. v. Remington Agricultural Works* (89 N. Y. 22) and *Licausi v. Ashworth* (78 App. Div. 486) are distinguishable from the case at bar. In the former, the name of the sole defendant, a corporation, was stricken out and the names of three individuals were substituted therefor. This, it was held, could not be done. It was evident that the plaintiff could not have originally intended to sue the individuals, and that the service upon the incorporation could not be deemed upon the individuals. In *Licausi v. Ashworth* (*supra*) the plaintiff was informed that one Ashworth was the proprietor of a business conducted under the name of the "Stanley Hod Elevator Company," and after suing Ashworth individually, discovered that the business was conducted by the Stanley Hod Elevator Company, which was a corporation of which Ashworth was the president. After the Statute of Limitations had run against an action in his favor against the company, he moved to strike out Ashworth's name as the defendant and substitute therefor the name of the company. This, it was held, could not be done. The court expressed the view that he had sufficient notice that the company was probably a corporation, to put him on more careful inquiry, and also decided that the court was without authority to substitute the name of a corporation for the name of an individual as defendant. It was observed by the learned justice who wrote the opinion that the plaintiff did not intend to sue the company, and that the service upon Ashworth in an action brought against him individually was not notice to the company. Here, however, it is to be observed that the plaintiff understood that the decedent worked for a corporation and intended to sue that corporation, and served an officer thereof, and the information contained in the papers served clearly disclosed to him, as an officer of the new corporation, that it was the new corporation which the plaintiff intended to name as defendant. Moreover, the connection of the two companies is not to be overlooked. The new took possession of the office of the old and continued, if not the same business, at least the same line of business; and the inference is plain that it was

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designed to succeed to the good will of the old company and lead the public and the employees to think either that there was no change or that it was the successor to the old company. It placed Tench as its active vice-president and treasurer in the same chair he had occupied as the active vice-president and treasurer of the old company which, although not formally dissolved, had in effect gone out of business. It follows, therefore, that the amendment was properly allowed.

The motion was granted without requiring the payment of costs. It does not appear that the defendant gave any erroneous information to the plaintiff prior to the commencement of the action which led to the mistake, and, therefore, it cannot be said to have been at fault. If properly sued originally it might not have defended. Under the order, it will be obliged to plead over, and will lose the benefit of all intermediate steps and proceedings. Therefore, the motion should have been granted, upon payment of ten dollars costs of the motion and statutory costs of the action to that date.

The order should, therefore, be modified, without costs of the appeal, by providing that the motion is granted upon payment of ten dollars costs of the motion and the statutory costs of the action to the date the motion was made.

PATTERSON, P. J., and INGRAHAM, J., concurred; SCOTT and CLARKE, JJ., dissented.

SCOTT, J. (dissenting):

In my opinion the order appealed from is wholly unauthorized. We have not here a case wherein the plaintiff made a mistake in the name of the persons intended to be sued. Her mistake was as to the identity of the person who had wronged her. She believed that her husband, at the time of his death, was in the employ of the Terry & Tench Construction Company, and, therefore, she sued that company. She now finds that her husband was employed by an entirely different corporation, to wit, the Terry & Tench Company, a separate and distinct entity, and that her claim, if she has one, is against the latter. The purpose of the order appealed from is to substitute the Terry & Tench Company as defendant in place of the corporation already sued, in the hope that by this means the plaintiff will avoid the plea of the Statute of Limitations which

might be set up if a new action against the Terry & Tench Company were to be now brought.

I am quite unable to distinguish this case from *New York State Monitor Milk Pan Assn. v. Remington Agricultural Works* (89 N. Y. 22) and *Licausi v. Ashworth* (78 App. Div. 486), in both of which an order, similar to that here considered, was declared to be unauthorized. It is said that it is evident that plaintiff intended to sue the Terry & Tench Company, because it was her clear intention to sue the company for whom her husband worked. That is true, but it is also true that it was equally apparent that the plaintiffs in each of the cases cited above intended to sue the persons against whom they had claims, and that they fell into precisely the same error that this plaintiff fell into, in mistaking the identity of the person against whom they had such claims. In short, we have here, not the case of a misnomer but a deliberate intention to sue the wrong defendant under the mistaken belief that it was the person from whom plaintiff had suffered damage.

The order should be reversed, with costs, and the motion denied.

CLARKE, J., concurred.

Order modified as directed in opinion, without costs of appeal. Settle order on notice.

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In the Matter of the Notice of Lien Filed by EUGENE A. RUDIGER and JOHN M. RUDIGER, Appellants, against a Certain Fund in the Hands of the Comptroller of the City of New York Applicable to the Payment of the Balance Due to JAMES S. COLEMAN, JULES BREUCHAUD and BERNARD F. COLEMAN, Respondents, upon Their Contract with the Aqueduct Commissioners of the City of New York for the Construction of the New Croton Dam.

First Department, March 8, 1907.

**Mechanic's lien on municipal improvements—when lien cannot be canceled by order.**

The only authority to discharge a mechanic's lien on motion is that contained in the statute and a municipal lien cannot be canceled on motion on the ground that an action has not been brought to enforce the same within the time prescribed by statute.

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The statute is self-operative and if an action to enforce it be not brought within ninety days after filing the lien, and if notice of pendency thereof be not filed within the same period with the financial officer of the municipal corporation with whom the notice of lien was filed the lien is discharged without order or action, except where it has been continued by order of the court.

APPEAL by the lienors, Eugene A. Rudiger and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of December, 1906, canceling a certain municipal lien against a fund in the hands of the comptroller of the city of New York applicable to the payment of the amount due the respondents upon their contract with the aqueduct commissioners for the construction of the new Croton dam and other structures in the Croton valley and Croton watershed.

*G. H. D. Foster*, for the appellants.

*David McClure*, for the respondents.

LAUGHLIN, J.:

The lien was filed on the 25th day of July, 1906. Two days prior to the expiration of the time within which the lienors were required by the statute (Lien Law [Laws of 1897, chap. 418] § 17, as amd. by Laws of 1902, chap. 37) to commence an action to foreclose the lien, they obtained an order from the Special Term of the Supreme Court pursuant to said section, continuing their lien for sixty days, and granting them sixty days' additional time within which to commence an action to foreclose it. A motion was subsequently made to vacate the order upon the ground, among others, that the court was misled or deceived. Pending this motion the lienors began an action to foreclose the lien. The contractors then applied for an order canceling the lien, upon the ground that more than three months expired after the lien was filed before an action to enforce it was commenced, and that the order extending the lien and extending their time to bring an action having been vacated, could afford no basis for the action subsequently begun. This may be so, but the question cannot be decided on this application. It may be presented by pleading the Statute of Limitations in connection with the facts. The only authority of the court to discharge liens on a motion is that con-

tained in the statute. The statute confers no authority upon the Supreme Court to cancel a municipal lien upon proof that an action has not been brought to enforce the same within the time prescribed by the statute. The statute is self-operative and the lien is discharged without order or action if an action to enforce it be not brought within three months after filing the lien, and if notice of pendency thereof be not filed, within the same period, with the financial officer of the municipal corporation with whom the notice of lien was filed, provided, of course, that the lien has not been continued by order of the court. (See Lien Law, §§ 17, 20, as amd. by Laws of 1902, chap. 37.) The contractors could have brought this matter to a focus by giving notice under section 3417 of the Code of Civil Procedure, requiring that the lienors commence their action to enforce the lien within the time therein specified, and on their failure to do so authority is conferred upon the court to cancel the lien.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion dismissed, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion dismissed, with ten dollars costs. Order filed.

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RUSSELL AND ERWIN MANUFACTURING COMPANY OF NEW YORK,  
Appellant, v. THE CITY OF NEW YORK and Others, Defendants,  
Impleaded with THE TWELFTH WARD BANK OF THE CITY OF NEW  
YORK, Respondent, and EUGENE H. HINKLE and TERRY HINKLE,  
Composing the Firm of HINKLE IRON COMPANY, Appellants.

First Department, March 8, 1907.

**Mechanic's lien — discharge thereof on undertaking by assignee.**

Although the statute only expressly authorizes the discharge of a mechanic's lien upon the application of a contractor who gives an undertaking, an assignee is equally entitled to the discharge, whether he be assignee of the entire contract or a part only of the moneys due thereunder.



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But the assignee, whether of the whole contract or part thereof, must give an undertaking for the payment "of any judgment which may be recovered in an action to enforce the lien," even though thereby he becomes responsible for the debts of third parties.

APPEAL by the plaintiff, Russell and Erwin Manufacturing Company of New York, and by the defendants, Eugene H. Hinkle and another, composing the firm of Hinkle Iron Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of December, 1906, authorizing the discharge, upon giving an undertaking, of certain municipal liens filed by the appellants against moneys due, or to grow due, the firm of Flood & Ryan, under a contract with the city for the construction of additions to a public school.

*Frank W. Hubby, Jr.*, for the appellants.

*Marcell C. Katz* [*Otto C. Sommerich* with him on the brief], for the respondent.

LAUGHLIN, J.:

The motion to discharge the liens upon giving an undertaking was made by the Twelfth Ward Bank, which held an assignment from the contractors of part of the moneys to be paid by the city under the contract. The first claim made by the appellants is that such an assignee has no standing to obtain a discharge of the liens. The statute only expressly authorizes the discharge upon the application of the contractor, but the courts have held that it should be construed as authorizing a discharge upon the application of an assignee of the contractor, who stands in the shoes of the original contractor. (Lien Law [Laws of 1897, chap. 418], § 20 as amd. by Laws of 1902, chap. 37; *Id.* 22; *Matter of Hudson Water Works*, 111 App. Div. 860. See, also, *Hawkins v. Mapes-Reeve Construction Co.*, 82 *id.* 72.) It is claimed that the decision last cited does not authorize an assignee of part of the fund merely to make the application. We are of opinion, however, that either an assignee of the entire contract or an assignee of part of the moneys due thereunder should be permitted to obtain the funds upon giving the undertaking required by the statute. It is not conceivable that

any one can be prejudiced by such course, and an assignee of part of the fund is quite as much within the spirit of the statute as an assignee of the contract. The point is that the person claiming to be entitled to the money earned under the contract may obtain it upon giving an undertaking to protect the other claimants. The undertaking, upon the giving of which the court has authorized a discharge of these liens, however, does not conform to the statute. The order merely requires an undertaking "conditioned for the payment to each lienor respectively of any sum found due on account of said lien to the extent that the said sum shall be found to have priority over and above the lien, if any, created by the said assignment of Flood & Ryan to the Twelfth Ward Bank." If the assignee of the entire contract or the assignee of part of the moneys due thereunder wishes to obtain the benefit of the statute and have the liens discharged and receive the money, he must take the same responsibility that the original contractor would have been obligated to assume, which is to give an undertaking for "the payment of any judgment which may be recovered in an action to enforce the lien." (Lien Law, § 20, subd. 5, added by Laws of 1898, chap. 169, and re-enacted by Laws of 1902, chap. 37.) This would, of course, make the bank and its surety responsible for the debts of third parties; but if it wishes to obtain the moneys, it must assume that responsibility, for it is only upon executing such an undertaking that the original contractor, who would have been liable to the lienors, was entitled to obtain the fund. The authority of the court to discharge such a lien by motion is wholly statutory, and, therefore, the discharge may only be granted on complying with the requirements of the statute.

It follows that the order should be modified by requiring an undertaking in the language of the statute, and as modified affirmed, without costs.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

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## STANDARD MATERIALS COMPANY, Appellant, v. THOMAS B. BOWNE &amp; SON COMPANY, Respondent.

First Department, March 8, 1907.

**Pleading**—bill of particulars— not granted before answer.

A motion by a defendant for a bill of particulars before answer will be denied, even though it be necessary for his defense.

APPEAL by the plaintiff, the Standard Materials Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of January, 1907, granting the defendant's motion for a bill of particulars.

Grant C. Fox of counsel [*Fox, Pierce & Rowe*, attorneys], for the appellant.

*Stilwell & Decker*, attorneys for the respondent.

CLARKE, J. :

The complaint alleges two causes of action, one for damages for wrongful refusal to accept certain bricks tendered under a contract of purchase and sale, and, second, for money laid out for the use and benefit of the defendant at its request. The defendant has not yet answered. The complaint sets up the contract in *ipsisimis verbis*, and alleges the acceptance of two deliveries thereunder and, upon certain specific dates, the refusal by the defendant to accept three other duly tendered deliveries.

In *American Credit Indemnity Co. v. Bondy* (17 App. Div. 323) this court held that where no answer had been served, a motion by the defendant for a bill of particulars, on the ground that it was necessary for his defense, must be denied, as it cannot be said that a defense will be made until an issue is raised by the service of an answer; and it was further held that such an order would not be granted to enable the defendant to answer where he was wholly ignorant of the particulars of the plaintiff's claim, inasmuch as the Code of Civil Procedure (§ 500) permits him to deny any knowledge or information sufficient to form a belief as to the allegations

of the complaint. That case was followed upon both points by the Appellate Division in the second department in *Hicks v. Eggleston* (95 App. Div. 162) and *Schultz v. Rubsam* (104 id. 20).

It follows, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

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GEORGE S. POLLITZ, Respondent, v. CONSOLIDATED GAS COMPANY  
OF NEW YORK, Appellant.

First Department, March 8, 1907.

**Gas — injunction to restrain shutting off gas denied when consumer  
refuses to give security for payment.**

There is nothing in chapter 125 of the Laws of 1906 fixing the price of gas in the city of New York which in any way repeals, modifies or affects the sections of the Transportation Corporations Law, which provide that a gas company may require a deposit as security for the payment of gas.

Hence, a consumer who refuses to make such deposit on demand is not entitled to an injunction restraining the company from shutting off his supply.

APPEAL by the defendant, the Consolidated Gas Company of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of February, 1907, granting an injunction *pendente lite* restraining the defendant from discontinuing, cutting off or refusing to continue to supply the plaintiff with gas at his premises.

*John A. Garver*, of counsel [*Shearman & Sterling*, attorneys], for the appellant.

*Clarence J. Shearn*, for the respondent.

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CLARKE, J. :

This is an appeal from an order granting an injunction *pendente lite*. The action was brought to restrain the defendant from depriving the plaintiff of the use of gas by reason of the plaintiff's refusing to pay therefor more than at the rate of eighty cents per 1,000 cubic feet as provided by chapter 125 of the Laws of 1906.

The complaint is similar to that served in the case of *Richman v. Consolidated Gas Co.* (114 App. Div. 216; *affd.*, 186 N. Y. 209). If the facts in the case at bar were similar to those presented in the *Richman* case, the order appealed from would have to be affirmed. The facts, however, differ.

Section 66 of the Transportation Corporations Law (Laws of 1890, chap. 566) provides that a gas company may require every person to whom it shall supply gas to deposit with such corporation a reasonable sum of money, according to the number and size of the lights used or required or proposed to be used for two calendar months by such person, and the quantity of gas necessary to supply the same, as security for the payment of the gas rent or compensation for gas consumed to become due to the corporation; and section 68 of said act provides that if any person shall refuse or neglect, after being required so to do, to make the deposit required, the corporation may prevent the gas from entering the premises of such person.

It appears by the answering affidavits that, based upon the prior consumption at the rate of eighty cents per 1,000 cubic feet, the sum of five dollars was a reasonable amount to demand from the plaintiff as a deposit to secure the payment of the gas for the ensuing two months at said rate. A demand was duly made upon the plaintiff to make such deposit as authorized by said section 66 of the Transportation Corporations Law (*supra*), and the plaintiff refused to comply therewith. There is nothing in chapter 125 of the Laws of 1906, fixing the price of gas, which in any way repeals, modifies or affects the sections of the Transportation Corporations Law hereinbefore cited.

Therefore, the defendant, by reason of the plaintiff's refusal to make the deposit required, has an absolute right under the statute to cut off his gas. The order appealed from restrains the defendant from exercising that statutory right. Upon this state of facts

the judicial discretion of the learned Special Term was improperly exercised. The plaintiff is in no position to ask the intervention of a court of equity in his behalf until he shall have first himself complied with the reasonable and legal demand of the defendant.

It follows, therefore, that the order appealed from should be reversed, with costs, and the application for an injunction *pendente lite* denied, with leave, however, to renew the same upon proof that said deposit has been made as required.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with costs, and application denied, with costs, with leave to renew as stated in opinion. Settle order on notice.

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WILSON R. HUNTER, Appellant, v. MUTUAL RESERVE LIFE  
INSURANCE COMPANY, Respondent. (No. 4.)

First Department, March 8, 1907.

**Foreign judgment — service of process on Commissioner of Insurance of  
North Carolina.**

The rule that a valid personal judgment can be obtained against a defendant insurance company in the courts of North Carolina by service of process upon the Commissioner of Insurance of that State, where the policy was issued by the defendant to a resident of that State prior to the revocation of the designation of such Commissioner as the person upon whom process may be served, applies equally to a policy which although originally issued to a resident of South Carolina was assigned to a resident of North Carolina before the designation was revoked.

The assignee is deemed to take the policy relying upon the designation which as to him is irrevocable the same as if the policy were issued to him directly. SCOTT, J., dissented, with opinion.

APPEAL by the plaintiff, Wilson R. Hunter, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 28th day of June, 1906, reversing a judgment of the City Court of the city of New York in favor of the plaintiff, entered on the 9th day of December, 1904, and dismissing the complaint.

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*Albert P. Massey*, for the appellant.

*Gordon T. Hughes*, for the respondent.

HOUGHTON, J.:

This action was begun in the City Court of the city of New York and judgment was rendered in plaintiff's favor. An appeal was taken to the Appellate Term of the Supreme Court, where the judgment was reversed, and, by permission, the plaintiff has appealed to this court.

The action is upon a judgment obtained in a court of general jurisdiction of the State of North Carolina by one Carter against the defendant upon service of process upon the Commissioner of Insurance of that State. Such judgment was assigned to this plaintiff, who brings this action, asserting that it is conclusive upon the defendant. The position of defendant is that no jurisdiction was obtained over it by the North Carolina court by service of process in this manner.

The validity and conclusiveness of North Carolina judgments against this defendant obtained for the same cause and by similar service of process have been recently considered by the Court of Appeals in two cases. The first is *Woodward v. Mutual Reserve Life Ins. Co.* (178 N. Y. 485), in which it was held that a valid personal judgment could be obtained against defendant in the courts of North Carolina by service of process upon the Commissioner of Insurance of that State where a policy had been issued by defendant to a resident of that State prior to the revocation of the designation of such Commissioner as the person upon whom process against defendant might be served. The basis of the decision was that such designation was a part of defendant's contract of insurance with residents of the State of North Carolina, and that as to such policyholders the designation was irrevocable. The second case is *Hunter v. Mutual Reserve Life Ins. Co.* (184 N. Y. 136), where it was held that this rule did not apply to policies issued to residents of other States, claims under which were assigned to a resident of North Carolina after the revocation of such designation. The basis of this latter decision was that the policy not having been issued nor the claim created upon the faith of the designation

of a person upon whom process might be served in that State, the defendant might revoke the same.

The present case differs in its facts from both of the above. The policy of life insurance or certificate under which the action in North Carolina was brought was issued on December 6, 1884, to one Gibson, a resident of South Carolina, his wife being the beneficiary. On the 23d day of January, 1896, the insured and the beneficiary assigned this policy, as is claimed, with the assent of defendant to one Carter, a creditor, a resident of North Carolina, who held the the same as such assignee on the 17th day of May, 1899, when the defendant revoked its designation of the Commissioner of Insurance of North Carolina as the person upon whom process might be served upon it in that State, and, as is alleged, withdrew from business therein because of adverse legislation. Carter, continuing to hold such policy as assignee, thereafter brought action against defendant in the Superior Court of North Carolina, which is admitted to be a court of general jurisdiction, serving process upon the Commissioner of Insurance, and obtained by default the judgment which he assigned to plaintiff and upon which this action is brought. The validity of the assignment to Carter is not questioned, and it, therefore, appears that more than three years before the attempted revocation of the designation of a person upon whom process against defendant might be served in the State of North Carolina, a resident of that State acquired such rights and interests as flowed from the policy of insurance.

It must be assumed that Carter took the assignment relying upon the faith of such designation, and, in our opinion, his interest in the policy was so founded upon it that as to him the designation was irrevocable. The assignment of all interest in a policy of insurance issued in another State to a resident of North Carolina years before any attempted revocation of designation is manifestly governed by the same principle as the issuing of a policy directly to a resident of that State.

The decision in this case is, therefore, controlled by the rule laid down in the *Woodward Case* (*supra*) rather than by that of the *Hunter Case* (*supra*). In the latter case the assignments were not made until after the revocation, and, therefore, could not have been taken on the faith of the existing designation.



Our conclusion is that the order and judgment of the Appellate Term should be reversed and the judgment of the City Court affirmed, with costs.

PATTERSON, P. J., LAUGHLIN and LAMBERT, JJ., concurred; SCOTT, J., dissented.

SCOTT, J. (dissenting):

In *Woodward v. Mutual Reserve Life Ins. Co.* (178 N. Y. 485) the action was founded upon policies issued to citizens of North Carolina before the attempted revocation of the power of attorney given to the Insurance Commissioner of that State to accept service of process on behalf of the defendant, and the validity of such service, after the attempted revocation, was sustained expressly upon the ground that the statutory obligation to keep an agent in the State upon whom process could be served, being in force when the policy was issued, was to be considered "precisely the same as if its promises to the State had been incorporated in the policies." In other words, as to policies issued in North Carolina the court read into the contract, as one of its provisions, a stipulation on the part of the company that the statutory provision that an agent should be kept in the State in which the contract was made, upon whom process might be served so that any question arising under the contract could be litigated in the courts of the State in which the contract originated. The policy involved in this action originated in South Carolina, and was issued to a citizen of that State, and certainly by no construction can an agreement be read into such a contract that the company will keep an agent in North Carolina to receive service of process there. The plaintiff's assignor had no contractual relations with the defendant company except such as he derived from his assignor, to whom the policy was originally issued, and any agreement between him and the company must be found within the lines of the policy, or be read into it by legal intendment, and neither in the letter of the policy or by legal implication can there be found a promise to maintain an agent in North Carolina for the purpose of receiving service of process in an action arising upon a South Carolina contract.

As was said in *Hunter v. Mutual Reserve Life Ins. Co.* (*supra*),

"claims under contracts executed in other States cannot by any possibility be regarded as having been contracted or acquired in reliance upon this provision for service within the State of North Carolina."

In my opinion the judgment of the Appellate Term should be affirmed, with costs, and judgment absolute be awarded to defendant upon the plaintiff's stipulation.

Determination reversed, with costs, and judgment of City Court affirmed, with costs. Order filed.

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WALTER F. KILPATRICK, Respondent, v. WILLIAM WHITMER & SONS, INCORPORATED, Appellant.

First Department, March 8, 1907.

**Sale — evidence — erroneous exclusion and admission of evidence as to damage.**

In an action founded upon the breach of a contract to sell and deliver lumber purchased from a wholesale dealer, it is error to admit evidence of the retail price of lumber as a basis of damage. Under such circumstances the damage is measured by the difference between the wholesale price and the price at which the defendant agreed to sell and deliver, and not the retail price which involves the expense of handling, storing and profit to the dealer.

So, too, it is error to exclude testimony of a sales agent of a foreign manufacturer who is shown to be familiar with the wholesale price of similar lumber at the place of delivery in this State.

APPEAL by the defendant, William Whitmer & Sons, Incorporated, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of June, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of July, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Wilson B. Brice*, for the appellant.

*Martin S. Lynch*, for the respondent.

HOUGHTON, J.:

The defendant, a lumber manufacturer, agreed to sell to plaintiff, a lumber dealer, twenty carloads of West Virginia clear spruce

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lumber at a specified price per 1,000 feet delivered at the city of New York. Only a part was delivered, and the plaintiff, claiming breach of contract by defendant and that the market price of this class of lumber had largely increased, brings this action to recover damages for failure to deliver the balance. From the judgment obtained by the plaintiff thereon the defendant appeals and urges that error was committed in receiving evidence as to the retail price of this character of lumber in the city of New York instead of confining the proof to the wholesale or manufacturers' price, and also that the court erred in excluding the evidence of defendant's witness Dunwoody as an expert on the wholesale market price during the time involved. In both of these contentions we think the appellant is correct.

Plaintiff's witnesses, Steinway and Tiemann, were both permitted to testify against defendant's objection as to the retail price asked by dealers in the city of New York for lumber of the character of that in dispute. Although each was accustomed to buy large quantities, each bought from dealers and not producers. Neither of them pretended to know the wholesale or manufacturers' price, and neither of them assumed to state any other prices than those at which he bought from dealers or at which dealers offered the lumber to him. Clear West Virginia spruce lumber or clear spruce lumber of any other locality is not produced in the city of New York but must be transported from the place of its manufacture. The defendant sold and the plaintiff bought at wholesale. Presumably there was a wholesale market for such lumber. The difference between such wholesale or manufacturers' price and that at which the defendant had agreed to sell was the measure of plaintiff's damage if in fact the defendant violated its contract with him. It is urged that the lumber in question was of a peculiar character and that no wholesale market price existed. The record does not disclose such to be the situation, and much clearer proof than appears must be presented before any rule different from the ordinary one can be invoked by plaintiff. It was, therefore, error to permit evidence of the retail price, which involves ordinarily not only the expense of handling and storing, but a profit to the dealer.

The witness Dunwoody, produced by the defendant, testified that he was sales agent for a large lumber manufacturer of West

Virginia clear spruce, and that his territory extended over several States, including New York, and that he was familiar with the wholesale price of such lumber during the period in question, and knew what it was quoted at and sold for in the city of New York. The fact that his office was located in the city of Philadelphia did not disqualify him, if he, in fact, knew the price of such lumber delivered at the city of New York, which he testified he did. The question involved was not what such lumber actually sold for in the city of New York, but at what price dealers in such city could buy such lumber from the producers, delivered at that city. This witness, whose testimony was excluded, appeared to be especially competent to testify in that respect. While his testimony, in a sense, would have been cumulative, in view of the very large increase of price awarded to plaintiff, we cannot say that his testimony, if admitted, would not have been influential with the jury.

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

PATTERSON, P. J., LAUGHLIN, SCOTT and LAMBERT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

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JAMES McLEAN, Respondent, v. GEORGE GRIOT and HENRY FISCHER, Appellants.

First Department, March 8, 1907.

**Sale—when vendor under conditional sale estopped from asserting title against purchaser from vendee.**

Although chattels are sold under contract of conditional sale whereby the title remains in the seller until payment, yet when the contract of conditional sale is not filed, and the seller receipts a bill for the amount due, stating that two notes and one check were received, and a third person to whom the receipt is exhibited purchased the property from the vendee in reliance upon the receipt, having first examined the records and finding nothing of record, the vendor is estopped from asserting title against the purchaser under a claim that the property has not been paid for.

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A promissory note given by a buyer may or may not constitute payment depending upon the agreement of the parties, but when the receipt showing the giving of a note states that the account is paid, a third party purchasing from the vendee may rely upon the receipt.

In any event a question for the jury is raised and a direction of a verdict for the seller is error.

APPEAL by the defendants, George Griot and another, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 26th day of March, 1906, affirming a judgment of the City Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 26th day of October, 1905, upon the verdict of a jury rendered by direction of the court, and also affirming an order of said City Court entered on the 26th day of October, 1905, denying the defendants' motion for a new trial made upon the minutes.

*Samuel F. Hyman*, for the appellants.

*Henry Hoelljes*, for the respondent.

HUGHTON, J.:

The action is in conversion and by his amended complaint the plaintiff alleges that on the 6th day of March, 1905, he delivered to one Gertenbach certain goods and chattels, consisting of meat and fish market fixtures and tools, without parting with the title thereto, and that subsequently Gertenbach delivered them to the defendants, who, on demand, refused to surrender them to plaintiff. The answer admits the delivery to Gertenbach and the transfer by him to defendants, and the demand and refusal to deliver to plaintiff. There is no dispute that if plaintiff is entitled to recover at all he is entitled to recover \$1,000.

Although the complaint alleges and the answer admits that "goods and chattels" were delivered, the plaintiff was permitted to prove on the trial, without objection, that he was a manufacturer of fish and meat market fixtures and appliances, and that on the request of Gertenbach he submitted to him a proposition to manufacture and put in place for him, for the sum of \$1,735, specified fixtures for a meat and fish market which he was about establishing, and that Gertenbach accepted the proposition and that the articles were thereafter manufactured and installed in the market, and that at

the time plaintiff's proposition was so accepted Gertenbach executed an acceptance by which he agreed "that the legal title to and ownership of said fixtures is to remain with James McLean until the entire amount of the purchase price is paid to him in cash."

The plaintiff furnished certain extras amounting to \$263.10, and on the 31st of March, 1905, rendered to Gertenbach a bill for \$1,998.10, at the bottom of which was the following:

"Paid Three & Six Mts. Notes (\$500.00 each) ck-998 10/100

"Recd. Pyt.

"JAMES McLEAN."

This was left with Gertenbach.

Gertenbach thereafter mortgaged the property by chattel mortgage for \$1,500, and on the 7th day of June, 1905, sold all of the market fixtures and appliances to the defendants for the sum of \$1,800, \$300 in cash to himself and \$1,500 by assuming to pay the chattel mortgage, which defendants immediately paid.

The evidence shows that at the time of such purchase by the defendants the receipted bill referred to was shown to them and that they relied upon it. The agreement of conditional sale signed by Gertenbach was not filed, nor was it executed in duplicate, and one duplicate delivered to the purchaser. There was evidence which, at least, made it a question of fact for the jury whether or not defendants inquired of Gertenbach if plaintiff had any claim on the property, and they took the precaution of having an attorney examine the record, and he found no conditional bill of sale on file.

The defendants insist that they were *bona fide* purchasers for value without notice of any claim on the part of the plaintiff, and that they were protected in their purchase because plaintiff had failed to file his conditional bill of sale, as provided by section 112 of the Lien Law (Laws of 1897, chap. 418, as amd. by Laws of 1904, chap. 698); and if this be not so, that no duplicate was delivered to the purchaser, as provided by section 115 of the Lien Law (*supra*, as amd. by Laws of 1898, chap. 354;\* repealed by Laws of 1905, chap. 503, in effect Sept. 1, 1905); and if neither of these positions be correct, that plaintiff is estopped from asserting his claim to the chattels because of the receipt of payment which he signed and gave

\* See Laws of 1904, chap. 698.—[RER.]

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to Gertenbach, and upon which they relied in making their purchase from him.

The position of the plaintiff is that because the goods were to be manufactured they did not come within the provisions of the Lien Law, and hence it was not necessary to file the contract of conditional sale, or to execute the contract in duplicate and deliver one duplicate to the purchaser; and that there was nothing in the receipted bill which could mislead defendants or authorize them to rely upon the fact that Gertenbach was the actual owner of the property.

The plaintiff received the \$998.10 upon the check of Gertenbach, and the two notes were his notes, neither of which was due at the time of the sale to defendants.

If the receipted bill was exhibited by Gertenbach to the defendants at the time of the purchase and it was stated to them that the plaintiff had no claim on the property, and they relied upon the form of the receipt in making their purchase and paying the consideration, we are of the opinion that they were justified in so doing and that the plaintiff is now estopped from asserting that the property had not been paid for and that it belongs to him, and that Gertenbach had no right to sell it.

Whether the giving of the buyer's note to the seller on a sale and purchase of personal property constitutes a payment of the purchase price depends upon the agreement of the parties to the sale. They may agree that it shall constitute a payment and they will be held to their bargain. (2 Pars. Notes & Bills, 156; *Tobey v. Barber*, 5 Johns. 68.) If such note be negotiable and the vendor and payee transfer it to a third party, so long as it remains in the third party's hands it operates as an absolute payment of the original consideration upon which it was taken. (*Battle v. Coit*, 26 N. Y. 404; *Fitch v. McDowell*, 145 id. 498.) It is only after the vendor has taken it up and regained possession of it before payment, that he is remitted to his original rights under the contract of sale, if there was agreement that the note should be taken in absolute payment. So, too, where upon the sale and delivery of goods the vendor receives from the purchaser the note of a third person, the presumption is that the note was accepted in payment and satisfaction of the purchase price. (*Gibson v. Tobey*, 46 N. Y. 637.) Even

as to a past indebtedness such note of a third person may be taken on the debt and in satisfaction of it, if the parties so agree. (*Noel v. Murray*, 13 N. Y. 167.)

The statement that the indebtedness of Gertenbach to plaintiff was paid by a check of \$998.10 and by two notes of three and six months each, did not specify of what character the two notes were, or whether they were the notes of the purchaser or guaranteed by some third party, or whether they were notes of some third party transferred to plaintiff, or whether they were taken as mere security for the debt and evidence of its liquidation as to amount. The fact that the account was said to be paid and that an acknowledgment of receipt of payment was signed by plaintiff, would indicate that the notes, whether those of the buyer or of some third party, were satisfactory to plaintiff and had been taken in payment of his claim. The question is not what the fact actually was with respect to the notes, but what defendants had a right to believe respecting them, in view of the solemn declaration of plaintiff that the account was paid by cash and notes. Assuming that the defendants knew nothing of the agreement between Gertenbach and the plaintiff that the plaintiff should retain title to the property until the purchase price was fully paid in cash, we think the defendants were entitled to rely upon the assertion of plaintiff that the account had been paid by notes satisfactory to him. Even if plaintiff was not compelled to file his contract of conditional sale he could have done so. Defendants took the precaution to examine the record and failed to find anything putting them upon any further inquiry, and if the fact be as claimed by them, that they relied upon the receipt which plaintiff put afloat and which might deceive or mislead and in fact did, and they had no notice of title or claim of title by plaintiff, we think the plaintiff is now estopped from asserting any such claim as against them. Whether this situation existed was a question of fact for the jury to determine and not for the court, and a direction of verdict in plaintiff's favor was, therefore, improper.

The rule is that where the owner of property confers upon another an apparent title to, or power of disposition over it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner. (*McNeil v. Tenth National*



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*Bank*, 46 N. Y. 325.) The plaintiff intrusted to Gertenbach not only the possession of the property, but also the written evidence over his own signature which might be taken as evidencing the fact that it had been fully paid for, and hence that he had title which he could transfer.

There is also to our minds a very grave question in view of the amendment of section 112 of the Lien Law in 1904 whether or not, notwithstanding the goods were to be manufactured, plaintiff was not obliged to file his agreement of conditional sale, or at least have his agreement executed in duplicate and deliver one duplicate to the purchaser as provided by section 115 of that law which was in force at the time of the delivery of the property. But inasmuch as we feel constrained to order a new trial for the reasons above given we do not deem it necessary at this time to pass upon that question.

The judgments of the Appellate Term and of the City Court must be reversed and a new trial granted, with costs to the appellants to abide the event.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and LAMBERT, JJ., concurred.

Determination of Appellate Term and judgment of City Court reversed and new trial ordered, costs to appellants to abide event. Order filed.

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SAMPSON H. SCHWARZ, Plaintiff, v. HENRY DUHNE, Defendant.

First Department, March 8, 1907.

**Real property—covenant against offensive trades—when not enforced by reason of altered character of neighborhood.**

Although a restrictive covenant made at a time when property in the locality was used for dwelling houses provides that no building other than dwelling houses or stores of brick, stone or marble, etc., shall be erected, and prohibits the carrying on of offensive trades, yet when the locality has ceased to be used for residential purposes, and is filled with inferior tenement houses, stables and factories, there has been such a change in the character of the neighborhood as to defeat the object of the covenant, and a court of equity will refuse to enforce it by injunction at the instance of an owner who otherwise would be entitled to the benefit of the restriction.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Sampson H. Schwarz*, for the plaintiff.

*Charles E. Hunter*, for the defendant.

HOUGHTON, J.:

The plaintiff and defendant own respectively premises Nos. 74 and 76 Horatio street in the city of New York. Many years ago the locality was a residential one and both parcels were owned by one Cutting who conveyed each subject to a covenant that no "buildings other than dwelling houses or stores of brick, stone or marble of at least two stories in height covering the whole front of each of the lots" should be erected thereon, as well as a further covenant against nuisances, embracing slaughter houses, furnaces, various manufactories, tanneries, "or any other manufactory, trade, business or calling whatsoever which may be in anywise dangerous or noxious or offensive to the neighboring inhabitants." Since this covenant was made the character of Horatio and surrounding streets has entirely changed. The plaintiff lives in his house, which is an old three-story one-family dwelling. The defendant's house is of the same character, but he uses the first floor for a wholesale oyster market and lives on the upper floors. No. 68 Horatio street, which is at the corner of Greenwich, and two doors from plaintiff's premises, is occupied as a Chinese laundry, with a stable in the rear and sawdust factory in the upper part. Nearby four houses have been converted into a double tenement house, with four families on a floor, and other double tenements so occupied are in the immediate vicinity. The surrounding streets are filled with tenement houses of poor character, stables, spaghetti factories and various other industries incompatible with an ordinary residential district.

The defendant purposes to remodel his house and convert it into a stable and carriage house, and the plaintiff asks that he be restrained from so doing in view of the covenants above set forth.

We think the stipulated facts show there has been such a change in the character of the neighborhood as to defeat the object and purpose of the covenants and to render it inequitable to deprive the defendant of the privilege of conforming his property to the uses

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to which the surrounding property is put. Where such a situation exists a court of equity will not enforce the observance of the covenants at the instance of an owner who otherwise would be entitled to the benefits of the restriction. (*Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *McClure v. Leaycraft*, 183 id. 36.) The plaintiff should not, therefore, have the injunction which he asks.

The judgment must be for the defendant, but only to the extent that it is adjudged that plaintiff is not entitled to an injunction restraining defendant from altering his building and changing it into a stable and carriage house.

The stipulation provides that no costs should be awarded and none are allowed.

PATTERSON, P. J., LAUGHLIN, SCOTT and LAMBERT, JJ., concurred.

Judgment ordered for defendant to the extent stated in opinion, without costs. Settle order on notice.

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THE STAR FIRE INSURANCE COMPANY, Appellant, v. CHARLES E. RING, Respondent, Impleaded with BREMER, DU FOUR, RING AND PINKNEY COMPANY, Defendant.

First Department, March 8, 1907.

**Principal and agent — right of principal to revoke agency — agent not entitled to continue employment.**

A contract made through general agents or managers appointing a local insurance agent for five years may be revoked by the principal, and, whether the revocation be right or wrong, the principal is entitled to enjoin the agent from continuing the occupation.

If the principal has been guilty of a breach of contract, the agent's remedy is an action for damages; he is not entitled to continue to act after revocation.

APPEAL by the plaintiff, The Star Fire Insurance Company, from an interlocutory judgment of the Supreme Court in favor of the defendant Charles E. Ring, entered in the office of the clerk of the county of New York on the 27th day of October, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the said defendant's demurrer to the complaint.

*Arnold L. Davis*, for the appellant.

*Holmes Jones*, for the respondent.

HOUGHTON, J. :

The complaint alleges that on the 2d day of November, 1903, through plaintiff's general agents and managers, the defendant Ring was appointed local agent for plaintiff, with power to write and issue policies of fire insurance, and that thereafter and on the 9th day of August, 1904, such appointment was revoked and annulled, and that notwithstanding such revocation the defendant continues to act as agent, claiming the power to write and issue insurance policies binding upon plaintiff. The relief asked is that the defendant be restrained and enjoined from issuing insurance purporting to bind plaintiff, and that he be required to deliver up all policies and books pertaining to such agency. The contract appointing the general agents of plaintiff, who appointed defendant, and his contract with such general agents, as well as the revocation of agency, are annexed to the complaint and made a part thereof.

By the contract that was entered into with defendant by the general agents of plaintiff the agency was to continue for a valuable consideration for the period of five years. This provision of the contract with respect to the period for which the agency should continue was deemed by the learned court below in considering the demurrer interposed by defendant as controlling upon the right to terminate the agency, and hence he concluded that because there was no legal right to revoke the agency, it remained unrevoked, and that the agency still continued, and that, therefore, the complaint stated no cause of action. The question presented is not whether the plaintiff had any right to discharge the defendant and terminate his agency, but whether either rightly or wrongly it has in fact done so.

The complaint shows that plaintiff has terminated the agency and revoked defendant's authority to write policies of insurance in its behalf. This being the fact defendant has no further right to continue to act as agent or to assume to write contracts of insurance binding upon plaintiff, and plaintiff has the right to enjoin him from continuing so to do. The continuance of such a practice might be highly injurious to plaintiff and equity will aid in enforce-

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ing its discontinuance. If the plaintiff has been guilty of a breach of its contract with defendant he has his remedy for damages, but he cannot continue to act as agent after revocation, although such revocation may have been wrongful. The complaint, therefore, states a good cause of action and the demurrer was improperly sustained.

The interlocutory judgment sustaining the demurrer should be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to withdraw demurrer and to plead over on payment of costs in the court below and of this appeal.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and SCOTT, JJ., concurred.

Judgment reversed, with costs, and demurrer overruled, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Order filed.

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LEMUEL A. WYMAN and FANNY WYMAN, His Wife, Respondents,  
v. MARY WYMAN, Individually and as Executrix, etc., of ISAAC  
WYMAN, Deceased and Others, Appellants, Respondents,  
Impleaded with MAUD HEILBRON and Others, Respondents, and  
RANDOLPH A. WYMAN and GERARD B. HEILMAN, Appellants.

First Department, March 8, 1907.

**Will — when probated against testimony of subscribing witnesses — facts not showing lack of testamentary capacity — when action of partition does not lie.**

A will may be probated notwithstanding the lack of memory of a subscribing witness or even in the face of his positive testimony denying proper execution. The testator, a lawyer fifty-seven years of age, two years before his death and when death was apprehended, made a holographic will which he carefully preserved. On probate the witnesses testified to due execution and to the testamentary capacity of the testator, but three years thereafter in an action of partition, while admitting their signatures to the attestation clause, denied the formalities of execution which they had previously sworn to. On all the evidence,

**Held**, that the will was properly admitted to probate and that the proof did not establish lack of testamentary capacity.

The will gave the whole residuary estate "absolutely and in fee simple to my beloved wife, \* \* \* her heirs and assigns forever. \* \* \* After the death of my beloved wife \* \* \* I request that my estate be closed up, should it be consistent so to do, and the proceeds to be divided share and share alike amongst my then living children."

*Held*, that, irrespective of whether the widow took the estate in fee simple or a life estate, an action for partition would not lie during her life.

APPEAL by the defendants, Mary Wyman, individually and as executrix, etc., and others, from portions of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 3d day of March, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

Also an appeal by the defendants, Randolph A. Wyman and Gerard B. Heilman, from the whole of said judgment.

*Leo Levy* [*C. Arthur Levy* with him on the brief], for the appellant, respondent, Mary Wyman.

*C. Elliott Minor*, for the appellants, respondents, Lorsch.

*David B. Cahn*, guardian ad litem for the infants Wyman and Heilman, appellants.

*Lewis M. Isaacs* of counsel [*Harry Mack*, attorney], for the plaintiffs, respondents.

CLARKE, J.:

This is an action for partition in which the interpretation of a will is asked, brought by an alleged devisee under the will. An issue is raised by one of the defendants, a daughter of the decedent, that the testator at the time he executed the will did not have testamentary capacity, and that the instrument was not signed, published and declared in the manner provided by law so as to be entitled to probate as a last will and testament.

Upon the trial plaintiff offered in evidence the deeds establishing the title of the premises in question in the decedent at the time of his death and the record from the Surrogate's Court showing the admission to probate on the 26th day of January, 1904, of the will of Isaac Wyman, dated May 26, 1902, as a will of real and personal property, and the necessary evidence as to the heirs at law of the decedent, and rested.

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Section 2627 of the Code of Civil Procedure provides that a decree admitting to probate a will of real property made as prescribed in article 1 of title 3 of chapter 18 of the Code of Civil Procedure, establishes presumptively only all the matters determined by the surrogate pursuant to said article as against a party who was duly cited or a person claiming from, through or under him. The defendant-appellant thereupon undertook to destroy that presumption.

The testator was fifty-seven years of age at the time of his death on January 11, 1904. The will bears date and purports to have been executed on the 26th day of May, 1902. The decedent was a lawyer and an insurance man. The will is holographic and contains a complete attestation clause and is signed by three witnesses, each of whom attaches his address to his signature. The will was found after the testator's death in his safe at his house in an envelope sealed with two sealing wax seals with the impression of his watch charm. Said envelope bore the inscription in the handwriting of the decedent "Last will and testament of Isaac Wyman" and "May 26, 1902." With the envelope containing the will was found a second envelope containing the inscription in the decedent's handwriting, "Notice. In case of my death, I request my family to open this letter of instructions and wishes immediately. I. Wyman," and on the back of this envelope the following, "Isaac Wyman, 48 East 91st St., New York." In this latter envelope were instructions as to the conduct of his funeral, funeral notice to be inserted in the papers, and a desire that his wife should furnish all his daughters their mourning suits and pay for the same, and that they should be dressed alike.

The testator was suffering with tuberculosis of the throat, and upon the advice of his physician went to the Adirondacks for his health within a day or two after the date of the will, May 26, 1902. From this fact and from the contents of these papers, it is a conclusive inference that, knowing the condition of his health and mindful of the uncertainty of life, he had put in order his worldly affairs before going away. As the will was in his own handwriting and was carefully preserved in his own possession in the safe in his own house for nearly two years after its execution, the envelope containing it indorsed with his own statement that it was his last will

and testament, it is impossible to reach any other conclusion than that, so far as he was concerned, he had intended to dispose of his property by a valid last will and testament, and that he supposed that he had done so.

Two of the attesting witnesses appeared on the probate proceedings on the 26th day of January, 1904, before the assistant to the surrogate and subscribed the usual depositions in probate proceedings, which depositions contain the verification of said assistant that the witnesses were sworn and examined before him on that day. Cohn's deposition contains the statement that he had been acquainted with the decedent fifteen years before his death, and Traub's that he had been acquainted with the decedent for twenty years before his death, and each contains the statement that the subscription of the name of the decedent was made by him in the presence of deponent and the other two subscribing witnesses, naming them; that at the time of said subscription to said instrument decedent declared the instrument so subscribed by him to be his last will and testament, and that the deponent then signed his name as witness at the end of said instrument at the request of said decedent and in his presence, and that the decedent at the time of executing said instrument was, in the opinion of said deponent, of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will; that deponent saw the other subscribing witnesses sign their names as witnesses at the end of said will and knows that they did so at the request and in the presence of the decedent.

There is no dispute but that the body of the will is in the handwriting of the decedent and was written with a broad-nibbed pen and in one kind of ink, while the signatures of the decedent and of each of the three subscribing witnesses with their addresses added are written with a sharp-pointed pen and with an ink different from that used in the body of the will, but of a similar appearance as to each of the signatures. There is also no dispute but that each of the four signatures to the will is in the proper handwriting of each of the persons purporting to have signed the same.

Nearly three years after the date of the will and one year after its probate upon the depositions of two of the subscribing witnesses these witnesses attempt to destroy this instrument, which



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undoubtedly embodies the testamentary intentions of the decedent, by evidence given upon the trial in flat contradiction to the attestation clause subscribed by them and to their depositions in the probate proceedings. They testified that at the time they signed the paper they did not know that it was a will, although each of them added his residence to his signature, a will being the only instrument to which the law requires that the residences of the witnesses be so added; that the signature of the decedent was not upon the will when they signed it; that their signatures were not made in the presence of each other, and although each swears that he signed at the request of the decedent that at the time of the signing he did not declare it to be his last will and testament. The paper was executed during the morning of May 26, 1902, at a saloon which had been the common meeting place of all of these parties for a number of years. There seems to be no doubt but that the pen and ink with which all the signatures were written was furnished by the bar-keeper who testified that shortly before the decedent went away to the Adirondacks he remembered an occasion of the signing of a paper by the decedent and these witnesses when he furnished the pen and ink.

The subscribing witnesses contradict each other in some respects in the account of the proceedings upon the morning that they admit they signed the paper. In view of the fact that the decedent was a lawyer and, therefore, acquainted with the requirements of the statute (3 R. S. 63, § 40) in regard to the necessary formalities in the execution of a last will and testament; that he drew the instrument with his own hand; that the attestation clause is full and complete; that the signature of the witnesses is followed by their several addresses; that the paper was kept carefully preserved, marked last will and testament of Isaac Wyman in the decedent's safe, together with a letter of instructions as to the details of his funeral in his own handwriting, in view of the presumption arising from the signatures being attached to the attestation clause and from the depositions taken before the assistant to the surrogate on the probate proceedings I think that the learned trial court who saw and heard the witnesses upon the stand was entirely justified in rejecting their oral testimony and in the conclusion reached by him of the due

factum of the will. Under such circumstances the conclusion reached by the trial court is of very great importance. Independent of that, upon the printed record as made, we are entirely satisfied with this conclusion.

There are many cases in the books in which the validity of a will has been established notwithstanding the forgetfulness of the subscribing witnesses or their positive testimony as to the failure to observe the prescribed formalities.

*Matter of Cottrell* (95 N. Y. 329) cites many of such cases and is a direct authority for the conclusion which we have reached in the case at bar. In that case, as in this, there was a holographic will, not only properly signed and executed by the testator, but also signed by the witnesses and appearing upon its face to be entirely regular and purporting to have been executed with all the formalities and in the manner required by law to make a good and valid will, but the two persons purporting to have signed that will as subscribing witnesses not only testified that none of the formalities required by the statute were complied with in its execution in their presence, but also positively denied that either of them was present at its execution or signed the attestation clause. Yet, nevertheless, the decree of the surrogate admitting the will to probate was affirmed by the General Term and by the Court of Appeals. Chief Judge RUGER said: "It would seem from the language of the Code\* that proof of the handwriting of the testator and of the subscribing witnesses to a proper attestation clause was regarded as the most important and conclusive fact on the trial of an issue as to a proper execution of a will. Such evidence in connection with other circumstances tending to prove its due execution would seem, within all the authorities to justify a decree admitting it to probate, even against the positive evidence of the subscribing witnesses. It was always considered to afford a strong presumption of a compliance with the requirements of the statute in relation to the execution of wills that they had been conducted under the supervision of experienced persons, familiar not only with the forms required by the law, but also with the importance of a strict adherence thereto." The learned judge proceeded to find that presumption in that case because the testator had not only once correctly gone through the

\* See Code Civ. Proc. § 2620.—[REP.]

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ceremony of executing a will, but by drawing the attestation clause in question he had at the time necessarily brought before his mind each one of the conditions imposed by the statute as necessary to its valid execution. "It is quite unreasonable to suppose that such a person having drawn and signed a will and having added thereto a proper attestation clause, should have provided witnesses therefor and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance." This presumption is all the stronger in the case at bar, because the decedent was a lawyer and drafted his own will with the proper attestation clause.

Upon the issue of the want of testamentary capacity the learned trial court said that it entertained "absolutely no doubt that he had that intellectual and mental power requisite for the execution of a will."

In my opinion the evidence justified and required that conclusion.

The will, after providing for the payment of the decedent's just debts and funeral expenses, and for a gift to each of his children of the sum of \$100, provided as follows: "*Third.* All the rest and residue of my property, real, personal or mixed, wheresoever situated, which I now own or may hereafter acquire and of which I shall die seized or possessed, I give, devise and bequeath absolutely and in fee simple to my beloved wife, Mary Wyman, her heirs and assigns forever—with this proviso and exception, that in case she should remarry, then I direct my children to take legal proceedings and have her removed as executrix. \* \* \* *Fifth.* After the death of my beloved wife, Mary Wyman, I request that my estate be closed up, should it be consistent so to do, and the proceeds to be divided share and share alike amongst my then living children."

The learned trial court held that under the said will the four children "are together seized and possessed of the remainder in fee of the real estate described in the complaint, as tenants in common, subject to the life estate therein of their mother, the defendant Mary Wyman, and subject to be divested by the death of any of the said remaindermen before the death of their mother, the said Mary Wyman," and "That the defendant Mary Wyman is seized of the life estate for and during her natural life, of said real property,"

and dismissed the complaint as to the partition and as to the construction of the will ordered judgment as found.

We do not agree with this construction of the will.

But it is unnecessary in this action to determine the precise estate given to the widow; for whether she holds an estate in fee simple or a life estate, this action for partition cannot be maintained.

The judgment should, therefore, be modified by striking out therefrom so much as construes the will, and as so modified affirmed, with costs to the executrix and the guardians *ad litem* to be paid out of the estate.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and SCOTT, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, with costs to the executrix and guardians payable out of the estate. Settle order on notice.

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In the Matter of the Probate of the Alleged Last Will and Testament of ISAAC WYMAN, Deceased.

HATTIE LORSCH, Appellant; MARY WYMAN and Others,  
Respondents.\*

First Department, March 8, 1907.

APPEAL by Hattie Lorsch from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 5th day of June, 1905.

*C. Elliott Minor*, for the appellant.

*Leo Levy* [*C. Arthur Levy* with him on the brief], for the respondent Mary Wyman.

*Harry Mack*, for the respondent Lemuel Wyman.

*Bernard S. Heller*, for the respondents Heilbron and Heilman.

CLARKE, J.:

This is an appeal from a decree of the surrogate refusing to revoke the decree by which a paper alleged to be the last will and testament of Isaac Wyman had been admitted to probate upon consent.

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\* See *Wyman v. Wyman* (*ante*, p. 109). — [REF.]

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The issues in regard to the proper factum of the will and testamentary capacity are those involved in the case in the Supreme Court of *Wyman v. Wyman* (118 App. Div. 109), in which the opinion was handed down herewith. The trial in the Surrogate's Court came on after the trial in the Supreme Court, and upon practically the same evidence the learned surrogate reached the same conclusion as that arrived at in the Supreme Court, namely, that the will had been duly executed, published and declared, and that the decedent had testamentary capacity and refused to revoke the decree admitting the instrument to probate heretofore made.

For the reasons stated in *Wyman v. Wyman* the decree of the surrogate was right and should be affirmed, with costs against the appellant Lorsch.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and SCOTT, JJ., concurred.

Decree affirmed, with costs to be paid by appellant to respondent. Order filed.

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In the Matter of the Application of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Relative to Acquiring Title, etc., for the Purpose of Opening Morris Avenue from the East Side of the New York and Harlem Railroad to the Grand Boulevard and Concourse, Twenty-third and Twenty-fourth Wards of the City of New York.

In the Matter of the Application of HORATIO D. WISWELL and HENRY B. WESSELMAN, Respondents, for the Payment of an Award Made to Unknown Owners; CARRIE I. SHOTWELL, Appellant.

First Department, March 8, 1907.

**Eminent domain — taking property for opening of Morris avenue, city of New York — award chargeable with deficiency judgment on foreclosure — interest — taxes accruing after taking of property not chargeable against award.**

Upon the foreclosure of a mortgage upon lands which have been taken for a city street, the lien of the mortgage covers so much of any damage awarded in the condemnation proceedings as is necessary to make good the deficiency.

The balance of the award above the payment of the deficiency judgment should be paid to trustees holding the lands for the benefit of persons having mechanics' liens thereon at the time they were taken by the city.

The right to compensation vests in the owners as a personal right at the moment of the taking of the property and interest begins to run from that date upon any award which may be made thereafter.

But sums due for taxes and assessments levied after the city became owner should not be deducted from the award.

When such taxes have been improperly withheld the person entitled to the award will not be remitted to a proceeding against the comptroller to recover the moneys, but the question may be disposed of in the condemnation proceeding.

APPEAL by Carrie I. Shotwell from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of June, 1903, resettling a prior order which confirmed the report of a referee and directed the chamberlain of the city of New York to pay out certain moneys.

*Joseph M. Williams*, for the appellant.

*Andrew J. Skinner*, for the respondents.

*William B. Ellison*, Corporation Counsel [*John P. Dunn* and *Thomas C. Blake* with him on the brief], for the city of New York.

CLARKE, J.:

In proceedings to acquire title to Morris avenue instituted under the street opening provisions of the New York City Consolidation Act (Laws of 1882, chap. 410, as amd.), an award of \$4,123 was made to unknown owners by the commissioners of estimate and assessment for certain lands designated as damage parcel 8 in their report, which report was duly confirmed by an order of the Supreme Court entered on the 19th day of June, 1902. Title to the lands in question vested in the city of New York for a public street on April 14, 1897.

Upon the petition of Horatio D. Wiswell and Henry B. Wesselman an order was entered by the Special Term directing the comptroller to pay into court the said award of \$4,123, together with lawful interest thereon from April 14, 1897, to the date when payment into court or as the court directs is made, "provided that the comptroller shall first pay and discharge out of the said sum or

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sums of money all lawful taxes or assessments or other lawful charges, if any there be now unpaid, upon the lot or parcel of land of which the above-mentioned lot or parcel of land taken in this proceeding was the whole or a part, and properly payable therefrom." The order further provided for the appointment of a referee to take proof of the title and grounds of the claims of the petitioners and of one Ethelbert Wilson to the award for damages or any portion thereof and to report the same to the court.

This is the usual order of reference in cases of unknown owners. The referee reported that Wiswell and Wesselman were entitled to the balance of said sum of \$4,123 after the payment to Shotwell, as assignee of Wilson, of the amount of a deficiency judgment upon the sale of said property, to wit, \$1,744.05, with interest from December 22, 1897.

Thereafter an order was entered by the Special Term on the 22d of June, 1903, confirming said report, and, it having been made to appear that the comptroller in conformity with the order of August 1, 1902, directing payment into court, had on October 14, 1902, paid to the collector of assessments and arrears, to the receiver of taxes and to the department of water supply, various sums amounting to \$1,784.20 and to the chamberlain of the city of New York as paid into court, \$3,695.39; the order recited that it appearing that all of said deductions were for taxes, assessments and water rents falling due subsequent to the year 1897, and subsequent to the time when said petitioners Wiswell and Wesselman ceased to have any right, title or interest in or to the lot or parcel of land of which the premises taken was the whole or a part, ordered that the chamberlain pay the said sum of \$3,695.39 in his hands with any accrued interest since October 14, 1902, as follows: First to the referee the sum of \$227, his fees and expenses, next to Carrie I. Shotwell the balance of the sum of \$1,744.05, with interest from December 22, 1897, to October 14, 1902, after deducting from said sum the amount of \$1,784.20 deducted by said comptroller from said award for taxes, assessments and water rents; that the balance of said sum of \$3,695.39 said chamberlain pay to the petitioners Wiswell and Wesselman, together with interest accrued since October 14, 1902, and it was further "ordered that this order is to be without prejudice to a motion or application on the part of said Carrie I.

Shotwell to compel said comptroller to pay over to her said several sums so deducted by him from said award or to make such other motion or application or take such other or further proceedings or action in the premises as she may be advised to compel payment of said several sums or any part thereof by said comptroller of the city of New York."

From each and every part of this order Carrie I. Shotwell appeals.

The appellant sets forth two distinct grievances. Her first contention, in which the city of New York has no concern, is that as between herself and the petitioners, Wiswell and Wesselman, she is entitled to the whole of the award to unknown owners. Her second contention, between herself and the city of New York and in which Wiswell and Wesselman have no concern, is that the deductions from the amount of the award by the comptroller for taxes, assessments and water rents were improper.

*First.* Parcel No. 8 consisted of four lots from the front of which a strip thirty-one feet in width was acquired by the city in street opening proceedings for a street. The title to the land taken vested in the city on April 14, 1897; therefore, the owners of the fee at the time the title vested were entitled to the award. The right to the damages at once accrued, though not fixed and ascertained until long afterwards, upon the confirmation of the commissioners' report. It appears that Ethelbert Wilson, a prior owner of the four lots which were then unimproved, conveyed the same to Eggers and Bissinger by deed acknowledged and recorded on the 14th day of April, 1896, for \$16,000, receiving back a purchase-money mortgage of \$12,000. Eggers and Bissinger proceeded to improve the property by erecting four buildings thereon. Mechanics' liens were filed against said buildings aggregating about \$4,000. The lienors canceled said liens upon an agreement that Eggers and Bissinger transfer the property to Wiswell and Wesselman, as trustees, to finish and take over whatever interest Eggers and Bissinger might have had at that time to protect these liens. This deed was acknowledged on the 17th and recorded on the 20th of October, 1896. Those discharged liens have never been paid, and Wiswell and Wesselman are here claiming the award as owners of the fee at the time of the vesting of the title in the city, as trustees, under



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said deed for said lienors. It seems clear that the deed from Eggers and Bissinger to Wiswell and Wesselman, as trustees, for the lienors whose work and materials had gone into the buildings upon this property, and who had filed valid liens therefor, was upon good and valuable consideration. The \$12,000 mortgage was foreclosed and a sale thereunder had on the 22d day of December, 1897, to Wilson, the original owner, said sale resulting in a deficiency judgment of \$1,744.05. But on April 14, 1897, title in the city to the thirty-one-foot strip had vested, and, therefore, the referee's deed, while purporting to convey the whole property, could not and did not affect this thirty-one-foot strip.

The question as to the right to an award as between a mortgagee and the owner of the equity has arisen in several cases and the rule seems to be well established that where a mortgage has been given upon property prior to the taking of a portion thereof by the city, that if upon a foreclosure and sale after the taking by the city, the amount realized is insufficient to meet the mortgage debt, the lien of the mortgage would extend to and embrace so much of the damages as awarded as should be needed to make good the deficiency. In *Matter of City of Rochester* (136 N. Y. 83), where title to a part of certain mortgaged premises was subsequently foreclosed and the land sold by the original description, leaving a deficiency, the court said: "The balance of the land only could be sold and conveyed on the foreclosure; the referee's deed could convey and did convey only that balance; and the right of the mortgagees became merely an equitable lien upon the fund in the hands of the court to the extent of any deficiency which the land sold did not pay. \* \* \* The fund was not sold; it simply remained in the hands of the court for distribution."

In the case at bar the land was taken by the city when the title vested. It was taken from the then record owners, Wiswell and Wesselman. It could not be taken from them without due compensation. The right to that compensation was vested in them as a personal right at the moment of the taking and interest from that moment began to run upon any award as compensation therefor as of that date. This court has lately reasserted these propositions after an examination of the cases in *Matter of Mayor, Trinity Avenue* (116 App. Div. 252).

Therefore, that portion of the order appealed from which awards to Wiswell and Wesselman so much of the award as remains after providing for the payment of the deficiency judgment is right.

*Second.* The appellant Shotwell complains that from the amount awarded to her in satisfaction of the deficiency judgment there has been deducted by the comptroller certain taxes, assessments and water rates as charged upon the property of which the whole or a part was taken in the condemnation proceedings. She alleges that the city has no claim against the award and that by this deduction her property has been taken without an opportunity to be heard and that she has been deprived of her property without due process of law. As a matter of fact she has been deprived of nothing, as this question was expressly reserved without prejudice, for future consideration.

It would seem, however, that the amount retained by the comptroller for unpaid taxes and assessments was improperly retained, but that question was not presented to the court below, and the matter is not, for that reason, properly presented on this appeal. All of the taxes and assessments sought to be charged against the award were levied after the city acquired title to the property in 1897. Of course the land, in place of which the award now stands, was not liable to taxation and assessment after the city became the owner, and consequently no lien, by reason of any tax or assessment thereafter levied, could attach to the award. By taking title the city had itself segregated the land taken from that which remained. The order of reference only authorized the retention of taxes and assessments "properly payable" out of the award, and did not justify the retention of any sum not so payable. It would work, as it seems to us, a practical injustice to the appellant Shotwell, after finding that she had a first claim upon the fund, to remit her to some expensive, and perhaps troublesome, proceeding against the comptroller for the recovery of moneys which he has apparently erroneously retained out of the award, and while the question has not been so presented as to enable us to dispose of it upon this appeal, we see no reason why it cannot be disposed of in this proceeding, for the question of the amount of the award subject to division among the claimants therefor is certainly a material and pertinent fact to be determined by the court. If it should be found,

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after affording the comptroller an opportunity to be heard, that no part of the sum retained for taxes and assessments is properly chargeable against the award, the whole award may be ordered to be paid into court, and after payment to Mrs. Shotwell of the amount of her deficiency judgment, with interest, the balance will be due to the petitioners, Wiswell and Wesselman. The order should, therefore, be reversed, without costs, and the matter remitted to the Special Term for rehearing upon due notice to the corporation counsel and the other parties to the proceeding.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, without costs, and matter remitted to Special Term as directed in opinion. Settle order on notice.

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THE MERRITT & CHAPMAN DERRICK AND WRECKING COMPANY,  
Respondent, v. WALTER J. TICE and Others, Appellants.

First Department, March 15, 1907.

**Evidence — when fact that defendant was insured may be shown as bearing upon the nature of contract with plaintiff.**

Although it has been held in a former trial of an action to recover compensation for services in saving a stranded vessel that the fact that the owners had insurance upon the vessel cannot be shown, yet when on a new trial there is a question as to whether there was a contract for work, labor and services of which the State courts had jurisdiction or whether the plaintiff was acting solely as salvor, in which case Federal jurisdiction was exclusive, it may be shown that a bill of services rendered by the plaintiff was presented by the defendants to the insurance company as a basis of damage when proof was admitted, without objection, that there was insurance on the vessel, for the retention of such bill bore directly upon the question of the nature of the contract, as an admission of indebtedness, and as affecting the credibility of the defendants.

SCOTT, J., dissented.

APPEAL by the defendants, Walter J. Tice and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 7th day of June, 1906, upon the verdict of a jury, and also from two orders

entered in said clerk's office on the 11th day of June, 1906, one denying the defendants' motion for a new trial made upon the minutes, and the other granting the plaintiff's motion for an extra allowance.

*James K. Symmers*, for the appellants.

*Avery F. Cushman*, for the respondent.

PATTERSON, P. J.:

This is the third time this cause has been before us on appeal (77 App. Div. 326; 97 id. 457), and it is unnecessary to state in detail the facts appearing upon the record. The plaintiff is a corporation, and the defendants were partners, who in December, 1898, owned a barge named the *E. W. Stetson*, which was stranded on the Long Island shore. It is alleged in the complaint that at the special instance and request of the defendants, the plaintiff performed certain wrecking service work and labor, and furnished materials to the defendants in and about the rescue and floating of the said barge, and bringing the same to the port of New York, putting her upon the dry dock and delivering her to the defendants. In their answer the defendants admitted that the plaintiff rendered certain service of the character referred to in the complaint, but they set up as an affirmative defense that in the prosecution of the work the plaintiff was acting purely as a salvor, and that neither the defendants nor any one of them entered into a contract or agreement or understanding with the plaintiff that it was to receive or that the defendants were to pay any sum whatever for the service, except such as the plaintiff might be entitled to as salvage compensation proportionate to the value of such property as might be saved by its efforts. On the first trial, before proof was taken, the defendants moved to dismiss the complaint on two grounds, one being that the court had no jurisdiction of the subject of the action. That motion was granted, but subsequently on a motion for a new trial the trial court reached a different conclusion and held that the State court had jurisdiction, and granted a new trial. On an appeal from the order entered upon that decision, this court held that the courts of the State would have no jurisdiction of an action brought to recover upon a marine contract for salvage, but that the Supreme

Court of the State would have jurisdiction of an action brought against the owner of the barge to recover upon an ordinary contract the value of work, labor and service. The order granting a new trial was affirmed, and a second trial being had a verdict was rendered for the plaintiff, and, on an appeal from that judgment, we held that in order to displace a salvage claim and substitute therefor a different contractual relation between the owners of vessels rescued from perils of the sea and the persons through whose exertions that result is accomplished, there must be proof of a contract specific and distinct in its terms which provides for compensation in any event, whether the imperilled property is saved or not. The judgment then appealed from was reversed for errors in the admission of evidence. It was held, as on the first appeal, that the complaint in this action was sufficient to allow the plaintiff to show that it had entered into a contract with the defendants of such a character as would displace a claim for salvage. On the trial from which the present appeal is taken the plaintiff produced evidence tending to show — and which did show, and the jury believed it — that the contract entered into between the parties was not one for salvage service, but for the payment of compensation to the plaintiff for such service as it might render in and about the rescue of the stranded barge, irrespective of what the result of such service might be.

There was, upon this branch of the case, before the court and jury the issue of fact as to what the contract entered into between the parties was. It was shown by the plaintiff that the compensation to be paid for its service was made upon the basis of day's pay; that that contract was made because there was too much uncertainty as to getting the vessel afloat, and that it was not practical to give a lump-sum figure for such a piece of work, and that the plaintiff would send to do it upon the day's pay basis, and make every endeavor to float and deliver the vessel; and it appears in evidence that one of the defendants said to go ahead and do the best that could be done. It was testified to that "day's pay" means the reasonable charge for the use of men and wrecking material in the prosecution of the work, and one of the defendants testified that he expected the plaintiff to get its pay; that he expected to pay it the reasonable value of the service rendered, and that nothing was said by the

defendants at the time of the employment about the compensation being taken "out of the boat." There was a clear issue of fact before the jury as to what the contract was, and they having found in favor of the plaintiff on that issue, there is no reason for disturbing the verdict. It cannot be said to be against evidence. With this finding of the jury (the law of the case having been settled by our previous decisions) the only subject for consideration remaining is that of alleged errors of the trial court concerning evidence. There is one error suggested which it is insisted is fatal to the plaintiff's right to recover. On the second trial it appeared in the record that the plaintiff was allowed, over the objection and exception of the defendants, to show that the defendants had insurance upon the barge to the amount of \$10,000, and that ruling of the trial court was deemed a radical error necessitating a reversal of the judgment. On the trial now under review the question of insurance was again made the subject of inquiry, and if the record presented it in the same form or in the same objectionable manner as upon the second trial, we should conceive it our duty to reverse again; but it is not presented in the same way, nor can the ruling of the court upon it be condemned in the same manner. Proof, without objection, came into the case that the defendants had insurance upon the barge. On cross-examination of a witness for the defendants, it appeared that the plaintiff had rendered a bill to the defendants for general services in and about the work of rescuing the barge and that that bill was retained for a long time by the defendants without their ever suggesting that there was only a salvage contract between the parties. The witness was asked, in substance, what he did with the bill and whether he did not present it to the underwriters. The purpose of that line of inquiry was to show that the defendants had received a bill for a specific amount, instead of for an uncertain claim arising from salvage; that they acquiesced in it, kept it for a long time without objection and afterwards adopted it as a reasonable charge, by submitting it to the underwriters as an amount for which they were liable in the matter of the rescue of the barge. This cannot be regarded only as an attempt to put the matter before the jury which would incline them to believe that the defendants were fully indemnified for their expense and that, therefore, a prejudice was created

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in their minds. It was legitimate as tending to show the attitude which the defendants themselves took with respect to the contract and a recognition of the fact that they had incurred an indebtedness for general services rendered by the plaintiff. The vice of the ruling of the justice on the second trial was in admitting, over objection, any evidence as to there being insurance and the amount of it. In the present case the evidence of the insurance was in without objection, and the conduct of the defendants with respect to the bill rendered and what was done with it was indicative of the understanding the defendants had concerning the nature of the employment of the plaintiff. The plaintiff was not allowed to give proof of the entire claim made to the underwriters nor whether the underwriters paid or not, and the evidence as far as admitted, was competent as affecting the credibility of the defendants, who testified that they never had any expectation of being obliged to pay the plaintiff except as for salvage services. There is nothing more in the case requiring consideration.

The judgment and orders appealed from should be affirmed, with costs.

LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred; SCOTT, J., dissented.

Judgment and orders affirmed, with costs. Order filed.

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EDWARD R. DUNHAM, Respondent, v. THE HASTINGS PAVEMENT COMPANY, Appellant.

First Department, March 15, 1907.

Contract to procure legislation — conflict of laws.

The question as to whether a contract to procure legislation is void upon the grounds of public policy is not a Federal question, but will be determined according to the law of this State.

SCOTT, J., dissented, with opinion.

APPEAL by the defendant, The Hastings Pavement Company, from an interlocutory judgment of the Supreme Court in favor of

the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of November, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the amended complaint.

*Austen G. Fox* [*John S. Sheppard, Jr.*, with him on the brief], for the appellant.

*Samuel Untermeyer* [*Abraham Benedict* with him on the brief], for the respondent.

LAUGHLIN, J. :

This action is based upon a contract in writing which the defendant has insisted from the commencement of the litigation was void upon grounds of public policy. On two former appeals, after trials on the merits wherein the record not only presented the contract, but proof of the nature and extent of the services rendered thereunder, this court adjudged that the contract was valid (56 App. Div. 244; 57 id. 426; 95 id. 360), basing its decision mainly upon the authority of *Chesebrough v. Conover* (140 N. Y. 382). We are now asked on the face of the contract alone, which is set forth in the complaint *in hæc verba*, to reconsider the former decisions of this court and declare the contract void upon the authority of *Veazey v. Allen* (173 N. Y. 359) which was drawn to the attention of this court on the second appeal, and on the authority of *Hazelton v. Sheckells* (202 U. S. 71) and *Sussman v. Porter* (137 Fed. Rep. 161, and cases therein cited). The views expressed in the opinion in *Veazey v. Allen* (*supra*), which in this regard were not essential to the decision, incline toward the doctrine subsequently announced by the Supreme Court of the United States in *Hazelton v. Sheckells* (*supra*), that the validity of a contract with respect to services concerning legislation or the action of public bodies or officials in awarding contracts is to be determined not by what is expressly contracted to be done, but upon what may be done thereunder and the tendency of the agreement, where the compensation is contingent upon success, to induce improper solicitation or the unlawful and corrupt use of money. The Court of Appeals, however, in the *Veazey Case* (*supra*) neither expressly modified nor overruled the *Chesebrough* case, but on the contrary reaffirmed its doctrine.



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Under the broad doctrine announced in *Hazelton v. Sheckells* (*supra*) it is clear that this contract could not be enforced. However, whether the contract be void upon grounds of public policy is not a Federal question, but one for the exclusive jurisdiction of our own courts. The majority of the court, as now constituted, would favor the adoption by the State courts of the doctrine enunciated in *Hazelton v. Sheckells* (*supra*), but since it apparently goes beyond any doctrine enunciated by the Court of Appeals and essential to the decision of the case before the court, and since the former decisions of this court under which this litigation has been continued, were based upon a former decision of the Court of Appeals, we think it should be left to that court to decide whether it was intended by the *Veazey* case, or is now the judgment of that court, that the doctrine of *Hazelton v. Sheckells* (*supra*) should be fully adopted in this State.

The interlocutory judgment should, therefore, be affirmed on the authority of the decisions of this court on the former appeals herein.

PATTERSON, P. J., HOUGHTON and LAMBERT, JJ., concurred; SCOTT, J., dissented.

SCOTT, J. (dissenting):

I feel constrained to dissent from the affirmance of this judgment. It is not strictly accurate to say that the legality of the contract was determined on the first appeal. All that was then decided was that the question of its legality should have been submitted to the jury. (56 App. Div. 244.) Even this result was arrived at with reluctance and under what was supposed to be a relaxation of the strict rule of *Mills v. Mills* (40 N. Y. 543) embodied in the opinion in *Chesebrough v. Conover* (140 id. 382). Since the first appeal the Court of Appeals in *Veazey v. Allen* (173 N. Y. 359) have expressly reaffirmed the rule of *Mills v. Mills* in all its stringency, and have again held that the test to be applied to what is claimed to be a lobbying contract, is not that the parties actually stipulated for corrupt action, or intended that secret and improper resorts should be made, but that it is enough to condemn such a contract that it tends directly to these results, and furnishes a temptation to plain-

tiff to resort to corrupt means or improper devices to influence legislative action. The Court of Appeals in discussing its decision of *Chesebrough v. Conover* makes it quite clear that it had no intention in that case to relax the strict rule above stated. It seems to me to be quite apparent, therefore, that the first appeal in this case was decided upon a misapprehension as to the force and effect of *Chesebrough v. Conover*. Upon the second appeal (95 App. Div. 360), although *Veazey v. Allen* may have been cited by counsel it is not referred to in the opinion, and was apparently not considered with reference to its explanation of *Chesebrough v. Conover*. It seems to me, therefore, that we are at liberty to consider *de novo* the question of the validity of the contract upon which plaintiff sues. As to its invalidity, tested by the rule stated in *Mills v. Mills* and *Veazey v. Allen*, I entertain no doubt. In my opinion, therefore, the judgment should be reversed and the demurrer sustained.

Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Order filed.

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FRANK W. McNEAL, Appellant, v. HAYES MACHINE COMPANY, INCORPORATED, Respondent, Impleaded with HAYES MACHINE COMPANY.

First Department, March 15, 1907.

**Debtor and creditor—creditor's action to establish lien on property assigned by debtor—when plaintiff has exhausted legal remedy—failure of corporation to plead misnomer in abatement—facts showing fraud.**

When a corporation doing business under a name not its own has answered under that name in an action against it without pleading a misnomer, it cannot in a subsequent judgment creditor's action against its assignee contend that the plaintiff had not exhausted his legal remedy, or that the execution returned unsatisfied was not an execution against the corporation.

When a defendant answers without pleading such misnomer or questioning the correctness of its corporate name, it is estopped from thereafter denying that it was sued by its correct name.

When a party is known by different names he may be sued under either without an alias, which rule applies to corporations as well as individuals.

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When a judgment creditor's action is not brought to set aside a transfer of property by a debtor but merely to assert a lien upon property transferred through two successive assignees, the first assignee is not a necessary party.

Evidence showing successive transfers of corporate property to an individual and another corporation managed by the same officers considered, and

*Held*, that the transactions constituted a constructive fraud against creditors and that the property was subject to an equitable lien.

APPEAL by the plaintiff, Frank W. McNeal, from a judgment of the Supreme Court in favor of the defendant, the Hayes Machine Company, Incorporated, entered in the office of the clerk of the county of New York on the 20th day of July, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits as to said defendant.

*Isaac N. Miller*, for the appellant.

*Frank D. Arthur*, for the respondent.

LAUGHLIN, J. :

This is an action by a judgment creditor to establish a lien upon property of the judgment debtor in the hands of a second assignee thereof.

On the 28th day of December, 1891, a certificate of incorporation incorporating the "John J. Hayes Machine Company" as a domestic corporation was duly filed. The certificate stated that it was to be formed "to manufacture and sell machines of iron, steel, or other metals, and to carry on a general machine shop business," and that its business was to be located in Brooklyn. The capital stock aggregated \$10,000, consisting of 100 shares of the par value of \$100 each. The corporation duly organized and thereafter carried on business at Nos. 108 to 118 West street, Brooklyn, under the name "Hayes Machine Company," for many years prior to the year 1903; and the name printed and used on its letter-heads, instead of conforming to its certificate of incorporation, was "Hayes Machine Co.," and it caused a sign giving the same name to be conspicuously attached to the exterior of its plant. Such were the facts when, on the 21st day of April, 1903, the plaintiff delivered to the company, at its said plant, a "Johnson Automatic Press," of the value of \$1,200, to be altered and repaired

pursuant to an agreement made between the parties. On the fifteenth day of June thereafter, the plaintiff brought an action in the Supreme Court in the county of New York against the company in the name under which it was doing business, to recover damages for an alleged breach of the contract to alter and repair said press, and for negligence in repairing the same, it being alleged that the press had been rendered valueless by the defendant. The defendant answered in the name under which it was sued, without pleading a misnomer or suggesting any mistake in its corporate name. The answer was verified by its treasurer on the 25th day of August, 1903, and although it did not specifically admit that it was a domestic corporation, it admitted the making of the contract alleged in the complaint and averred performance, and denied damaging the machine. During the pendency and before the trial of this action, the company, in the name under which it was incorporated, by a bill of sale bearing date April 28, 1904, assigned to one Samuel W. Low, for a consideration specified in the bill of sale as one dollar, "all of its assets of every kind and nature, including tools, machinery, stock on hand, patterns and patents, excepting only those accounts receivable, due and payable on or before April 2nd, 1904." The bill of sale was executed by the treasurer who had verified the answer, and by the president, pursuant to a resolution adopted at a meeting of the stockholders at which all stock was represented. The minutes of the meeting of the stockholders showed that the stock of the company was owned as follows: Sixty-four shares by John J. Hayes, president; twelve shares by Alonzo W. Fiske, Jr., treasurer; twelve shares by William H. Hayes, son of the president, and twelve shares by Frederick Knocher. The resolution adopted at the meeting of the stockholders was as follows:

"WHEREAS, John J. Hayes has assumed the payment of all outstanding accounts.

"*Resolved*, that all assets of this Company, including U. S. patents, but excluding the accounts due to the company, prior to April 3rd, 1904, be sold to Samuel W. Low for One Dollar."

At the same meeting a resolution was offered and adopted as follows: "That this company discontinue business and go into liquidation as soon as possible." On the eleventh day of May

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thereafter, a certificate of incorporation bearing date the twenty-eighth day of April—the day the meeting of the stockholders at which the execution of the bill of sale was authorized was held—was duly filed, incorporating the “Hayes Machine Company, Incorporated,” as a domestic corporation. The certificate of incorporation showed that it was incorporated “to manufacture and sell special and general machinery and to do a general machine shop business.” The incorporators were said Low and one Frank D. Arthur, and said Fiske, who was treasurer of the old company, and they were named as the directors for the first year. The capital stock of the company was to consist of 200 shares of the par value of \$100 each. On the day following the incorporation of the new company, Low executed a bill of sale to it of “all the assets and patents that I acquired from the John J. Hayes Machine Company and from John J. Hayes individually, by two certain agreements dated April 27th, 1904,” the consideration named in the bill of sale being the entire capital stock of the new company, to be issued, 198 shares to said Low and 1 share each to said Fiske and Arthur, and it was issued accordingly. The record does not show what, if any, property was transferred to Low by Hayes individually. Low became president, Fiske, treasurer, and said William H. Hayes, son of the president of the old company, secretary, and thus, with the exception of the new president, the officers of the new company were the same as those of the old. The new corporation used the name “Hayes Machine Co.” in large type on its letter-head, followed by the letters “Inc.” in small type, and continued the same sign upon the building and the same superintendent, whose name also appeared upon the letter-head, and took charge of the plant of the old company and continued the business at the same place. It does not appear that any notice was sent by the old company or by the new to the customers of the old company of any change in the ownership or management of the business, nor is there any evidence of any facts which would give notice to the customers or to people doing business with the company of such change. There is no evidence that the old company transacted any business after the execution of the bill of sale and the adoption of the resolution to liquidate its business. Thereafter and on the 26th day of June, 1905, the action begun by the

plaintiff in 1903 against the "Hayes Machine Company" came on for trial. The defendant failed to appear and plaintiff took judgment for \$1,100, together with interest and costs, being the full amount of his claim, less apparently \$100, the contract price of the repairs to be made on the press. Judgment was duly entered on the 28th day of June, 1905, and a transcript thereof filed in the office of the clerk of the county of Kings the next day, and execution duly issued thereon to the sheriff of Kings county, where the judgment debtor resided, was returned unsatisfied prior to the commencement of this action. In this action the old company defaulted, but the new company appeared and defended. It was shown that the automatic press which plaintiff delivered to the old company for repairs still remained at the plant and that shortly prior to the 1st of May, 1904, which would be about the time the old company authorized the bill of sale to Low, the treasurer of the old company, in the presence of its secretary, informed a representative of a mercantile agency who called with a view to giving the company a rating that the assets of the company were about \$20,000 and that its liabilities were \$3,000 or \$4,000, and that on the tenth day of January thereafter, he again called and interviewed Low, the president of the new company, for the purpose of giving the new company a rating, and was informed that it had succeeded the Hayes Machine Company, which on May 1, 1904, had assets aggregating \$20,000, which he itemized as follows: "Tools and machinery, \$7,045; stock finished, \$4,112.69; patterns, \$3,842.31; patents, \$5,000," and that the assets of the new company were the same except that it had added tools of the value of \$800 since May 1, 1904, and he claimed that there were no liabilities. The defendant showed that there was no corporation by the name of "Hayes Machine Company," and Low testified that he purchased the assets from the John J. Hayes Machine Company and had no knowledge of plaintiff's claim until the sheriff came with the execution against the Hayes Machine Company in August, 1905; that he paid \$10,000 for the assets, \$5,000 in cash to John J. Hayes and \$5,000 in notes payable to the order of John J. Hayes, individually; that he received an inventory of the property and was informed by Fiske, the treasurer of the company, that the press which plaintiff delivered to the company did not belong to the company, but that he took everything else

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except the book accounts; that he received no statement of the indebtedness of the company, but presumed that it had liabilities. Frank D. Arthur, one of the incorporators of the new company, testified that he represented Low in all these transactions; that at the time Low purchased the assets of the old company he inquired of its treasurer about its indebtedness and was informed that it only owed some small debts which would be paid, and whether there were actions pending against it and was informed that there was but one action pending, and in that the company was plaintiff. It does not appear that Low asked for or obtained a statement of the liabilities of the old company, or inquired with respect to the circumstances under which the plaintiff's press was left at the plant, or why it still remained there. The trial court found and decided that both Low and the new company were innocent purchasers for value and took the assets free and clear of any liens of creditors of the old company.

The respondent contends that the plaintiff had not exhausted his remedy against the old company and, therefore, could not maintain the action. The basis of this claim is that plaintiff did not show that he obtained a judgment against the old company and that execution had been duly issued and returned unsatisfied thereon prior to the commencement of the action. The respondent invokes the rule, well established by authority, that equitable assets can only be reached after the remedy at law has been exhausted, which can only be shown by the return of an execution unsatisfied. (*Harvey v. Brisbin*, 143 N. Y. 151; *Kerr v. Dildine*, 60 Hun, 316; *Adee v. Bigler*, 81 N. Y. 349; *Beardsley Scythe Co. v. Foster*, 36 id. 561; *Dunlevy v. Tullmadge*, 32 id. 457; *McCullough v. Colby*, 5 Bosw. 477.) This principle is so well established that it is not open to question. It does not follow, however, that the judgment was not a judgment against the corporation merely because there was an error in the corporate name, nor that the execution should not be deemed an execution against the corporation. If the defendant had defaulted in appearing or answering then the plaintiff would justly be held to strict practice and the judgment could only be entered and execution issued against the party defendant designated in the summons and satisfied out of its property (*Schoellkopf v. Ohmeis*, 11 Misc. Rep. 253; *Fischer v. Hetherington*, Id. 575; *Durst*

v. *Ernst*, 45 id. 627; *Produce Bank v. Morton*, 67 N. Y. 199), but where, as here, the defendant appeared and answered without pleading the misnomer in abatement or questioning that the name by which it was designated in the summons was its correct corporate name, it will be deemed estopped from thereafter denying that the name under which it was sued is its correct corporate name (Freem. Judg. [4th ed.] § 154; *First National Bank v. Jaggars*, 31 Md. 38; *Waterbury v. Mather*, 16 Wend. 611; *Tasker v. Wallace*, 6 Daly, 364), and in fact the judgment in such circumstances is an adjudication as to the name of the defendant. (*Waterbury v. Mather*, *supra*.) It is to be borne in mind that the name by which the old company was sued was the name which it had assumed and in which it had transacted its business and by which it was known. It is well settled that where a party is known by different names he may be sued under either without an alias. (*Isaacs v. Mintz*, 16 Daly, 468.) I see no room for distinction in this regard between a corporation and an individual. I am of opinion, therefore, that the judgment should be deemed to be a judgment against the John J. Hayes Machine Company; that the execution should be deemed to have been issued against that company, and that it should be presumed from the return of the execution unsatisfied that the sheriff was unable to find any property of that company upon which to levy the execution. It is the duty of the sheriff in executing an execution to act under the direction of the attorney for the plaintiff. (*Root v. Wagner*, 30 N. Y. 9.) It should be presumed that the attorney for the plaintiff knew where the plant and property of the company were. This also appears by the fact that a transcript of the judgment was filed in Kings county, where the company had been doing business, and that an effort was made by the sheriff at the former plant of the company to find property belonging to it, for it appears by the testimony of Low that the sheriff came there with the execution. According to the evidence he must have found the new company in possession and presumably claiming all the property. I am of opinion, therefore, that the plaintiff has a standing to maintain the action.

It is further claimed that Low, individually, is a necessary party to the action, but I am of opinion that this contention is also erroneous. It is not sought in this action to set aside the respective trans-



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fers of the property from the old company to Low, and from him to the new company, and restore title to the old company. The plaintiff merely claims an equitable lien upon the assets of the property of the old company now in the possession of the new company, to the extent of the amount of his judgment, interest and costs. He does not ask judgment disturbing its title, excepting to the extent of having this lien declared against and satisfied out of the property. The title and possession of the property as it now is in the new company is recognized, but it is to be subjected to this lien the same as if the new company had executed a mortgage thereon therefor. In such case the intermediate transferee might be a proper, but is not a necessary, party. (*Cook v. Lake*, 50 App. Div. 92; *Bierschenk v. King*, 38 id. 360.)

I am of opinion that the finding of the trial court that Low was an innocent purchaser for value is against the weight of evidence, and that in any view of the evidence, even though there was no actual fraud, the transfer of the property constituted a constructive fraud upon the creditors of the company and is void as against them. It is not necessary to decide whether the evidence would have warranted a finding of actual fraud on the part of Low, who is in reality the new company, for in any view of the evidence there was constructive fraud which is sufficient to subject the property transferred to the lien of plaintiff's judgment. Low knew that the old company was going out of business, for he took all of its property, with the exception of some past-due accounts, and he took possession of its plant; and the resolution of the company, with knowledge of which he is, in the circumstances, chargeable, showed that it intended to discontinue business and terminate its career. The evidence showed that he stated that the value of the property on the 1st of May, 1904, four days after he purchased it, without any evidence of a change of circumstances, was twice the consideration paid by him therefor. At most, he blindly assumed that the president of the old company, to whom he paid the entire consideration, excepting the nominal consideration of one dollar, and who owned less than two-thirds of the stock of the old company, was to pay its debts, and he made no definite inquiry with respect to the extent of its indebtedness or as to whom its creditors were. His attention was drawn to the plaintiff's press, and it was specifically stated that title

to that did not pass to him under the bill of sale, and, so far as appears, he made no inquiry to ascertain what, if any, liability the company had incurred by reason of the presence of that property. He might have ascertained, if he had inquired, that the action was pending which subsequently resulted in the judgment to enforce which this action is brought. The transfer to Low and the organization of the new company were part of a preconceived plan. The form in which the transfer was made can give the new company no greater protection than if the property had been transferred directly to it and the consideration paid as it was paid to Low, namely, by the issue of the entire capital stock. The treasurer of the old company, who became one of the incorporators of the new, presumably under an arrangement made with Low at the time of the original negotiations, had full knowledge of the facts. No explanation is offered for changing the name of the corporation, or as to why Low could not have purchased all of its capital stock and continued the business without forming a new company. In the circumstances, I deem it quite clear that the new company took title subject to the claims of creditors of the old company. It is a well-settled rule of law that the creditors of a corporation have an equitable lien upon its assets for the payment of their claims. (*Wilson v. Æolian Co.*, 64 App. Div. 337; *affd.*, 170 N. Y. 618; *Cole v. M. I. Co.*, 133 id. 164; *Bartlett v. Drew*, 57 id. 587; *Hurd v. N. Y. & C. Steam Laundry Co.*, 167 id. 89; *People v. Ballard*, 134 id. 269.) This was not a purchase of property from a corporation in the ordinary course of business. The purchaser knew that the effect of the transfer was to wind up the business of the old corporation without conforming to the statutory provisions applicable thereto, which would have secured the appropriation of its property to the payment of the claims of its creditors. Assuming that Low and the other stockholder of the new corporation who was not connected with the old were innocent, and that they believed that the president of the old company would use the consideration paid by Low in paying off the claims of creditors of the old company, yet of this they took the risk. They could have protected themselves by an inquiry with respect to the claims and by seeing that the purchase price, had it been the fair value of the property, was applied in settlement of the claims of creditors; but instead of doing this, they took all

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of the property with the exception of these past-due accounts, the amount or value of which does not appear, and left the company stripped of its assets without other than a nominal consideration paid to it and the creditors without remedy except to follow this property in their hands. This in law clearly constituted a constructive fraud against creditors and subjects the property in the hands of the new company to a judgment of the court declaring and enforcing an equitable lien of the creditors of the old company thereon, and subjects the new company to liability to account for the property to the extent necessary to satisfy the claims of the creditors of the old company. (*Wilson v. Æolian Co.*, *supra*; *Cole v. M. I. Co.*, *supra*; *Bartlett v. Drew*, *supra*; *Hurd v. N. Y. & C. Steam Laundry Co.*, *supra*; *People v. Ballard*, *supra*; *Brum v. Merchants' Mutual Ins. Co.*, 16 Fed. Rep. 141.)

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., HOUGHTON and LAMBERT, JJ., concurred; SCOTT, J., concurred in result.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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CATHERINE M. BREMER, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

First Department, March 15, 1907.

**Eminent domain—injury to easements by railroad viaduct—failure to show damage.**

In an action to recover damages to the rental value of premises by the maintenance of a railroad viaduct in Park avenue in the city of New York, it appeared that there had been no diminution in the rental value of the upper portion of the building, and that the vacancy of the lower portion antedated the period for which damage was claimed, and was not caused by the building of the viaduct but by the passage of the Raines Law, which affected the value of the premises for saloon purposes. On all the evidence, *Held*, that an award of damages was not warranted.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court

in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of October, 1906, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

*Alexander S. Lyman* of counsel [*Ira A. Place*, attorney], for the appellant.

*James C. Bushby* of counsel [*Bushby & Berkeley*, attorneys], for the respondent.

CLARKE, J. :

This action was commenced on the 5th day of July, 1901, for rental damages from February 16, 1897, to June 26, 1900, for the alleged maintenance and use by the defendant of the viaduct railroad structure in Park avenue opposite premises then owned by the plaintiff, situated on the northwest corner of Park avenue and One Hundred and Thirty-second street. The lot has a frontage on Park avenue of twenty feet and extends along One Hundred and Thirty-second street seventy-five feet. The building is four-story brick with an extension in the rear, two stores on the ground floor, five dwelling rooms on the second floor and six dwelling rooms on the third and fourth floors. The court found the rental value was depreciated from February 16, 1897, when trains were first operated on the structure, to June 26, 1900, when the premises were sold under foreclosure, in the sum of \$1,785, or at the rate of \$530 per year.

Prior to the viaduct improvement the railroad structure opposite the premises consisted of a depressed cut with retaining walls and surmounted by a parapet three feet high, said structure being about sixty-three feet in width from out to out of the retaining walls at the surface of Park avenue. Four tracks were laid in said structure, the base of rail being about eighteen inches below the surface of Park avenue. The depressed cut bisected Park avenue between One Hundred and Fifteenth street and the Harlem river and entirely prevented access from one side of the avenue to the other except over bridges. The bridge for teams and pedestrians was at One Hundred and Twenty-ninth street and bridges for pedestrians only at One Hundred and Thirtieth and One Hundred and Thirty-

first streets. The extreme width of the viaduct structure opposite plaintiff's south line was sixty-two feet six inches and at the north line sixty-two feet. The space, therefore, occupied in the avenue by the new structure is less than that occupied by the previous depressed cut structure. The extreme height of the structure opposite the premises is twenty-two feet four inches above the grade of Park avenue. The nearest portion of the structure is distant from plaintiff's premises forty-four feet ten inches at the south line and forty-seven feet eight and one-half inches at the north line. The avenue opposite the premises, formerly occupied by the depressed cut, has been filled in, graded and paved, and is now a portion of the surface of Park avenue.

Charles Henry Hall was the common source of title of the plaintiff's predecessor in title, and the New York and Harlem railroad, which corporation acquired from said Hall, then the owner of the bed of Park avenue in front of plaintiff's premises, by a deed, a strip of land twenty-four feet in width, extending along the center line of Park avenue, for the purpose of constructing and operating its railroad thereon, with the right to slope any embankment or excavation of its railroad structure to the exterior lines of said avenue as then laid out on paper.

The learned trial court excluded from evidence the said deed from Hall to the New York and Harlem Railroad Company. It also excluded chapter 702 of the Laws of 1872; chapter 907 of the Acts of Congress of 1890;\* chapter 339 of the Laws of 1892; chapter 548 of the Laws of 1894; chapter 613 of the Laws of 1898, and chapter 729 of the Laws of 1901, which exclusions were duly excepted to.

The claim in this case being confined to damages caused by a diminution of the rental value from February 16, 1897, to June 26, 1900, by reason of the change of the railroad structure from a cut eighteen inches below the grade of the street, which completely cut off one side of the avenue from the other, to an elevated structure about twenty-two feet high, and a transformation of the surface of the street from a cut to a paved street allowing access in all directions, requires an examination of the evidence to see whether it

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\* See 26 U. S. Stat. at Large, 426 *et seq.*—[REF.]

sustains the judgment rendered. The best evidence of the rental value is the amount of the actual rents received. If the change from a surface to an elevated railroad inflicts damage upon abutting property it would be natural to find that portion of the property especially invaded by the structure suffering therefrom. Although by this elevation of twenty-two feet the trains have been brought immediately opposite the windows of the living portions of the premises, it appears conclusively in the evidence that the rentals of such portion have not been affected at all, but that the same rents were paid for all the living apartments above the ground floor throughout this period of three years that had been paid theretofore for the same apartments. It does appear that the ground floor, access to which has now been made possible from all directions, has been vacant during this period, but it had also been vacant for more than two years prior thereto. It was formerly used as a liquor saloon and the learned court has found as a matter of fact that the passage of the Raines Law in 1896 (Laws of 1896, chap. 112) injuriously affected the rental value of the corner store of the plaintiff's premises for saloon purposes.

Since all the loss of rentals, as proved, is confined to the ground floor and as the vacancies therein long antedated the period for which this defendant is here sought to be made responsible, and as there is another cause found by the court which injuriously affected the rental value of this ground floor property, it is impossible to find a proper basis in the evidence for the amount of damages awarded in this case.

This, taken with errors committed in the exclusion of evidence, leads to a reversal of the judgment and the ordering of a new trial, with costs to the appellant to abide the event.

PATTERSON, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

MORTON H. C. FOSTER, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

First Department, March 15, 1907.

**Eminent domain — injury to easements by Park avenue viaduct in city of New York — limitation of action — prior action discontinued insufficient to interrupt acquisition of easement by adverse user — measure of damages for enlargement of viaduct — constitutional law — statute authorizing viaduct not unconstitutional.**

The running of the period of twenty years whereby a railroad may acquire the right to maintain its structures in front of adjoining property by adverse user is not stopped by the bringing of a prior action for an injunction if the action was discontinued.

The rule that the bringing of an action which is subsequently discontinued does not interrupt the running of the Statute of Limitations applies equally to cases of prescriptive rights obtained by adverse user.

But although a right to damages caused by reason of structures maintained for twenty years may be lost, yet, when new structures are added to those already in existence, the owner may recover the net difference in money between the effect of new and old structure while in actual use less the benefit conferred by the latter and also the damage inflicted by the temporary work during the period of user.

A defendant railroad, however, is not liable for the acts of the board of Park avenue improvement in the city of New York while the viaduct on that avenue was in the possession of the board for the purposes of construction.

The statutes requiring change in the viaduct structure in Park avenue are not unconstitutional, and in an action against the railroad by a private owner for damages caused by such structure, it is error to exclude evidence of said statutes and the contracts between the Park avenue board and the contractors for work done in pursuance thereof.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of October, 1906, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

*Alexander S. Lyman* of counsel [*Ira A. Place*, attorney], for the appellant.

*James C. Bushby* of counsel [*Bushby & Berkeley*, attorneys], for the respondent.

CLARKE, J.:

This action was commenced April 30, 1900, to recover damages for diminution of rental value alleged to have been caused by a trespass upon the easements appurtenant to plaintiff's premises situated at the southeast corner of Park avenue and One Hundred and Eighth street, by reason of various railroad structures erected at different times in front of said property. The premises are known as No. 1475 Park avenue. The lot has a frontage of fifty feet on the avenue of the uniform width of twenty-five feet six inches. The building is four-story brick with two stores on the ground floor and two apartments of four rooms each on the upper floors.

The history of Park avenue and the occupation of a portion thereof by railroad structures has been stated so often in recent cases in this court and in the Court of Appeals as not to require repetition here. Pursuant to chapter 702 of the Laws of 1872, the railroad viaduct structure of the New York and Harlem Railroad Company opposite the plaintiff's premises was increased in width so as to be about fifty-nine feet wide at the bottom and was modified so that the base of rail was twenty-four feet two and three-quarters inches above the grade of Park avenue at the south line of plaintiff's premises and twenty-three feet eleven and one-quarter inches at the north line of plaintiff's premises and four tracks were laid thereon, said structure being surmounted by parapet walls about three feet above the base of rail, upon which structure trains were continuously operated from the date of completion of said structure, in or about the year 1875, down to September, 1894. Pursuant to the provisions of chapter 339 of the Laws of 1892, as amended by chapter 548 of the Laws of 1894, the board for the Park avenue improvement above One Hundred and Sixth street, appointed pursuant to said first-mentioned act, by its contractors erected along the easterly and westerly roadways of Park avenue, between the respective curb lines and the permanent viaduct structure, wooden trestles, each of which supported two tracks, and pursuant to the direction of said board trains were operated on said temporary trestles from September, 1894, to February, 1897. During said period the roadbed of the stone embankment in front of plaintiff's premises was increased in height by said board so that the base of



rail was about five feet higher after the improvement than it was prior thereto, although the parapet walls of the former stone structure were not changed nor added to.

It was decided in *Lewis v. New York & Harlem R. R. Co.* (162 N. Y. 202), plaintiff's property in that case being situated between One Hundred and Fourteenth and One Hundred and Fifteenth streets, that while the defendants had acquired no right by adverse possession as against the city, they had acquired certain rights by prescription as against the abutting owner; that the old structure had stood in the street so long that the railroads had acquired a prescriptive right to have it stand there forever so far as the plaintiff was concerned; that she could claim no damages on account of the old structure so long as it stood there; that she could claim no damages for a new structure which was erected in the same place and for the same purpose, which inflicted no more injury upon her property than the old; that had the new structure been no higher than the old in front of her property, none of her rights would have been invaded and she would have been entitled to no relief, but that she had the right to recover the net difference measured in money between the effect upon her property of the old and the new structure while in actual use, less the benefits conferred by the latter.

In the case at bar, the action having been begun on April 30, 1900, plaintiff has been allowed to recover from September, 1894, that is for six years prior to the commencement of the action, damages for the injury caused to his premises by the existence of the stone viaduct in front of said premises, upon the theory that the whole structure, as erected pursuant to the authority of the act of 1872, constituted a trespass upon his easements. The plaintiff claims that as to him the defendant had acquired no prescriptive rights. This claim, which has been supported by the trial court, is based upon the fact that in 1892 he commenced an action against this defendant and the New York and Harlem Railroad Company for an injunction and damages by reason of said structure erected and operated by trains under chapter 702 of the Laws of 1872. The claim is that as prescription rests upon the presumption of a lost deed after adverse use and enjoyment for twenty years, that this

presumption as to a lost deed may be rebutted, and that so far as the plaintiff is concerned it was rebutted by the bringing of the action referred to. But the said action was discontinued on the 27th day of February, 1900, prior to the commencement of the action at bar. "By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled so that the action is as if it never had been." (*Loeb v. Willis*, 100 N. Y. 231.)

This precise question was before Mr. Justice RUSSELL in this Park avenue viaduct litigation in *Campbell v. New York & Harlem R. R. Co.* (35 Misc. Rep. 497), who said: "I cannot hold that the abandoned suit of 1891 is such a disturbance of that user as to justify the claim that the use was broken. The discontinuance is as forceful as the commencement of the action. It was an admission that that action was not maintainable, and such inference cannot be rebutted by the commencement of a later action."

It has been many times held that the beginning of a suit which is subsequently discontinued does not interrupt the running of the Statute of Limitations, and in all the cases dealing with prescriptive rights, based upon the presumption of a lost deed, the period of time of adverse user has been put at twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations. (*Lewis v. New York & Harlem R. Co.*, *supra*, and cases therein cited.)

It seems to me that the claim, the assertion of which was evidenced by the beginning of the suit of 1892, was abandoned and rendered of no effect by the voluntary discontinuance, and, therefore, constituted no interruption of the running of the prescriptive period. If the court had not held that the plaintiff was entitled to recover for the whole structure, as erected pursuant to the act of 1872, it might well have followed that it would have held that the slight addition of about five feet in the height of the base of rail, without any elevation of the parapet and without any widening of the structure, would have caused no material injury to the plaintiff's premises. It must be borne in mind that under the rule as laid down in the *Lewis* case, which case is now a leading and controlling authority by reason of the decision in *Muhlker v. Harlem R. R. Co.* (197 U. S. 544), the plaintiff has the right to recover the net

difference measured in money between the effect of the new and the old structure while in actual use, less the benefits conferred by the latter, and also for the damages inflicted by the temporary work during the period of user. The defendant is not liable, however, for the acts of the board for the Park avenue improvement while either structure was in its possession for purposes of construction.

It follows, therefore, that the judgment in the case at bar, based upon structures and during periods for which the defendant was not liable, cannot be sustained.

As the case must go back for a new trial, it becomes necessary to allude to certain exceptions to the exclusion of evidence offered by the defendant.

The court excluded chapter 702 of the Laws of 1872, chapter 339 of the Laws of 1892, chapter 548 of the Laws of 1894, chapter 613 of the Laws of 1898, the plans and profile of the structure provided to be built by chapter 702 of the Laws of 1872, the plans of the work required to be done by chapter 339 of the Laws of 1892, and certain contracts between the Park avenue board and the contractors for work to be done under said plans and in pursuance of said laws; in other words, the legislative requirement for the changes in the structure theretofore existing and the plans and acts done thereunder, the ground for the exclusion being that said acts were unconstitutional. The acts were not unconstitutional and never have been so held. The Supreme Court of the United States, referring to the previous decisions of the courts of this State in the elevated railroad litigations, commencing with *Story v. New York Elev. R. R. Co.* (90 N. Y. 122), said in the *Muhlker Case* (*supra*): "When the plaintiff acquired his title, those cases were the law of New York and assured to him that his easements of light and air were secured by contract as expressed in those cases and could not be taken from him without payment of compensation." This was not a holding that the acts requiring the change in the viaduct structure were unconstitutional, but in the absence of any provision in said acts as to the payment of due compensation for any easement to be taken thereby the Supreme Court read into the acts the constitutional provision affecting all legislation, that private property could not be taken for public use without due compensation. It was error, therefore, to exclude the evidence offered.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PATTERSON, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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MARY A. JONES, Individually and as Administratrix, etc., of EVAN JONES, Deceased, and Others, Respondents, *v.* ADELAIDE JONES and Others, Appellants, Impleaded with MARY G. JONES and Others, Defendants.

First Department, March 8, 1907.

**Appeal — decision of General Term *res adjudicata* on subsequent appeal to Appellate Division — when partition agreement will be enforced in equity.**

The old General Term had power to reverse the decision of the Special Term upon the law and direct it to make an interlocutory judgment in accordance with its decision based upon facts found by the trial judge. Such former decision affirms the facts, but reverses upon the law and is *res adjudicata* and not to be reviewed by the Appellate Division upon a subsequent appeal.

When parties have entered into an agreement, partly written and partly oral, settling a dispute and providing for the partition of lands and both parties have acted under the agreement and acquiesced in a partition made by an arbitrator and have remained in possession ever since, equity will enforce the agreement and compel the execution of the conveyances necessary to vest each party with the property awarded to him. .

APPEAL by the defendants, Adelaide Jones and others, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 29th day of March, 1906, upon the report of a referee, with notice of an intention to bring up for review upon such appeal an order or interlocutory judgment of the General Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 25th day of October, 1879, and also an order or interlocutory judgment of the Special Term purporting to have been made in pursuance of said order or judgment of the General Term.

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First Department, March, 1907.

*Richard T. Greene*, for the appellants.*Edward M. Shepard*, for the respondents.

INGRAHAM, J. :

This action was commenced in 1875. The original parties were Evan Jones (plaintiff) and John Jones (defendant). The parties to the action had been partners, and as such had owned certain real property which had been purchased with the money of the copartnership, some of which had been used in the copartnership business. An answer was interposed by the defendant John Jones, and the case came on for trial before Judge VAN VORST in February, 1877. It appeared from the evidence that the father of the original parties to this action established a business, and that both of his sons, the parties to the action, worked with him in conducting it; that after the death of the father, the plaintiff and the defendant continued the business, the earnings being paid to the mother of the parties to the action, to whom letters of administration of the father's estate had been issued, she paying bills and the expenses of the household; that some time after this arrangement the plaintiff went to California, leaving the defendant to carry on the business during his absence; that upon the plaintiff's return from California in 1850 he resumed his work with the defendant, and they carried on this business together down to 1870; that during that time some of the money realized for this business was used in the purchase of certain real estate, a part of which was used for the business and a part was rented. Some time before this copartnership was dissolved it appeared that the parties had quarreled, so that they had not spoken directly to each other. There seems, however, to have been a friend, in whom they both had confidence, named McCaddin, and the brothers were in the habit of communicating with each other through him. After the partnership had terminated, the defendant claimed that the plaintiff had collected rents of this real property to which the defendant was entitled, and both parties desired to settle up their accounts and to divide the real property that had been acquired by the money of the copartnership. It appeared that while the plaintiff was in California there had been purchased two pieces of property which were known as the Unionport property and the Morrisania property. The plaintiff claimed that this property

was copartnership property, having been purchased with money in the hands of the mother of the parties who was administratrix of the father, and who seems to have joined with her sons in carrying on this business, and for that reason the plaintiff was entitled to have these two pieces of property treated as copartnership property; the defendant, however, claiming that this property had been purchased by himself with his own money and that it belonged to him. However, both parties applied to McCaddin to assist them in settling up and dividing this copartnership property, and an agreement was finally arrived at, which was reduced to writing, and signed by both of the parties to the action. This instrument is as follows: "This agreement made this 26th day of May, 1875, between John Jones and Evan Jones, both being owners of property equal one-half, do hereby agree to divide the same by appointing Henry McCaddin, Jr., to receive our bids on said property, the party bidding the highest to have said property or part of it, the gross bids to be divided equal, if any difference over each other's half, the other to take a mortgage for the same, the expense of the conveyancing each to bear half, each party to be entitled to possession on the first of June, and to assume the tenants in possession and their leases and agreements and the mortgages on the property."

As a part of this settlement it was agreed that the Unionport property and the Morrisania property should be considered as copartnership property, the plaintiff to pay one-half of the cost of carrying the property. Under this agreement both parties submitted to McCaddin bids for the several pieces of property, the plaintiff making the largest bid for No. 6 Centre street and the Morrisania and Unionport properties, and the defendant making the largest bid for the property on the corner of Pearl and Centre streets, 510 Pearl street and 56 Centre street. McCaddin, therefore, awarded the property to the one making the largest bids for it, and the evidence is conclusive that each of the parties entered into exclusive possession of the properties awarded to him, and such possession has continued until the final judgment. The parties then presented their accounts to each other, about which they seem to have disagreed. The defendant included in his statement a claim for taxes, assessments and repairs and other charges and expenses connected with the Morrisania and Unionport properties over and

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above the rents collected therefrom, which the plaintiff refused to allow, and the plaintiff presented a bill to the defendant for two sums aggregating eighty-one dollars, one item for flagging and the other for law expenses, which the defendant refused to allow. The parties, therefore, being unable to agree upon a settlement of these amounts, the defendant refused to convey any of the property to the plaintiff, although the plaintiff tendered deeds to carry out the partition agreement conveying his undivided interest in the property awarded to the defendant. This action was then brought to enforce this partition agreement and for an accounting which was tried before Judge VAN VORST. His decision found the foregoing facts: That the plaintiff did not comply with his agreement to adjust the accounts between him and the defendant and to repay to the defendant one-half of the cost of carrying the Morrisania and Unionport property and did not pay to the defendant the one-half of the rents which he (plaintiff) had collected which were a condition precedent to the attachment of any obligation under this instrument and, therefore, the defendant was justified in refusing to make the division of the property contemplated by the parties, and dismissed the complaint. Upon an appeal to the General Term this judgment dismissing the complaint was reversed, and the court, adopting the findings of fact by the trial court, directed that an interlocutory judgment for an accounting before a referee to be appointed by the interlocutory judgment should be entered, and that upon the filing and confirmation of the referee's report a further and final judgment should be entered by the Special Term for the final disposition of the entire controversy between the parties to the action; and the case was sent back to the Special Term for the entry of such interlocutory judgment. (18 Hun, 438.) In pursuance of this direction an interlocutory judgment was entered at the Special Term by the judge before whom the case was tried, which recited the trial, the judgment of the Special Term dismissing the complaint, the appeal to the General Term and the direction of the General Term thereon; and it was ordered and adjudged that the facts so found, as they appeared in the written findings of fact, dated November 13, 1877, signed by Mr. Justice VAN VORST, be deemed a part of the interlocutory judgment, with the like effect as if incorporated therein fully and at large. It was further ordered that the referee

should take and settle the accounts of the parties; that the parties should appear before the referee and submit to the referee for decision their disputed accounts, severally and respectively; that the said referee make and file his report therein with all convenient speed; and that the final and further judgment of the Special Term for the final disposition of the entire controversy between the parties be reserved until the filing and confirmation of the said report. The defendant appealed to the Court of Appeals from this order of the General Term, but that appeal was dismissed (81 N. Y. 35); whereupon the parties proceeded before the referee, such reference commencing on May 13, 1880, and it seems to have proceeded with much deliberation until June 24, 1882, when the further reference was adjourned until July 7, 1882, at which time there was no further adjournment, and the proceeding seems to have been dropped by both parties. It would appear that other actions were commenced between the parties, and that pending the determination of these other actions no further proceedings were had before the referee. In 1883 the defendant John Jones died, and in 1898 the plaintiff died. Subsequently the action was revived, and finally, on the 19th day of December, 1902, the trial was continued before the referee, who, of all the parties and attorneys to the original action, is the sole survivor; and finally, on March 13, 1905, the referee made his report, and upon that report final judgment was entered, and it is from that judgment that these defendants appeal.

In disposing of this appeal we are bound to enforce the judgment of the General Term, and that the questions there decided are not to be reviewed by this court upon this appeal. The questions presented on the appeal from the judgment of the Special Term dismissing the complaint were before the General Term for review, and their decision is the law of the case. An examination of the opinion of Mr. Justice DANIELS at the General Term clearly shows what the court there intended to decide, and upon this appeal we should give effect to the rule established by the General Term, and final judgment should be entered in conformity with this decision. I do not wish to be understood as expressing any doubt about the correctness of the decision of the General Term, as I concur fully in the opinion of Mr. Justice DANIELS in the disposition of the appeal. That learned judge, in stating the conclusion



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of the court, said: "Upon the facts so established and found by the judge the action should have been retained until a proper accounting could have been secured, and this portion of the dispute determined between the parties, and upon that determination a direction could then be made for the payment of the balance found due on the accounts, and the consummation of the written agreement by the execution and delivery of the proper deeds for the conveyance of the real estate."

The court, therefore, having determined the proper judgment that should have been entered by the Special Term, upon the facts found by the Special Term, sent the case back to the Special Term for the proper interlocutory judgment to be there entered, and in pursuance of such direction the interlocutory judgment was entered and the accounting had, and under this direction of the General Term, the condition of the accounts between the parties being ascertained, judgment was to be entered directing the payment of the amount found due and for the execution of the conveyances to carry the partition agreement into effect. Counsel for the appellants contends that this direction of the General Term was unauthorized, and that the court had no power to direct an interlocutory judgment under the decision of the Court of Appeals in *Van Beuren v. Wotherspoon* (164 N. Y. 368), but it seems to me that counsel entirely misapprehends that case. In this case the General Term did not attempt to retry the action or to interfere with the findings of fact by the Special Term. The only disagreement between the two courts was as to the judgment to which the parties were entitled upon the facts found, and the General Term held that upon the facts found the dismissal of the complaint was error, but that the court should have directed an interlocutory judgment for an accounting, with a final statement of the accounts between the parties, and the case was sent back to the Special Term with a direction that such interlocutory judgment be entered.

In the *Van Beuren Case* (*supra*) the Appellate Division (12 App. Div. 421, 429) reversed a judgment upon questions of law only and directed a reference to take proof of certain facts upon which a final judgment in favor of the plaintiffs therein was ordered. The court held that while the Appellate Division was authorized to reverse upon the facts it did not exercise that jurisdiction; that it was not

authorized to reverse upon the law in that case, as there was evidence to sustain the findings of fact, and upon those findings of fact the defendants were entitled to judgment. In this case the General Term reversed upon the law and simply directed the Special Term to make an interlocutory judgment in accordance with this decision based upon the facts found by the trial judge, which was an affirmance of the facts but a reversal upon the law, a decision which we should not on this appeal review.

The accounting between the parties having been taken before the referee, the only substantial question presented upon this appeal is whether any error was committed upon that accounting, and whether, upon the state of the accounts having been ascertained, the final judgment that was entered was in accordance with the interlocutory judgment and the determination by the General Term as to the rights of the parties. I think the report of the referee was sustained by the evidence and that the court below was justified in confirming it. In consequence of the long period that elapsed since the action was commenced and the death of both parties to the action, it was difficult to ascertain exactly the account between the parties at the termination of the partnership; but both the original plaintiff and defendant were examined before the referee, and, so far as is disclosed by the evidence, the referee correctly determined the questions presented to him and the final judgment, therefore, correctly required the representatives of the defendant to pay to the representatives of the plaintiff the amount found due upon that accounting.

I think there can be no serious question but that the parties to this action were entitled to have this partition agreement carried out. There seems to be no dispute but what the parties acted under the partition agreement, and each of the parties acquiesced in the award made by McCaddin after the bids had been submitted and took actual possession of the property awarded to him, which possession has been maintained to the present time. It was thus a partition agreement partly in writing and partly by parol, actually executed, that a court of equity would enforce by requiring the parties to execute the necessary conveyances to vest each party with the title to the property which had been awarded to him. (*Wood v. Fleet*, 36 N. Y. 499; *Taylor v. Millard*, 118 id. 244.)

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I think that this final judgment does substantial justice ; that it is in accordance with settled principles, and that this litigation, extending as it has over thirty years, should now be finally disposed of, and the judgment should, therefore, be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

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JOSEPH FERRARI, Respondent, v. INTERURBAN STREET RAILWAY COMPANY, Appellant.

First Department, March 8, 1907.

**Trial — erroneous charge as to effect of attempt to bribe witness and failure to produce witnesses.**

When it is a question as to whether the defendant's agent attempted to bribe or improperly influence a witness, it is error to instruct the jury that such an attempt, if found to have been made, affords a "presumption" against the whole of the defendant's evidence. Such an act creates no presumption whatever but is simply a circumstance to be considered by the jury in determining the weight of the evidence.

So, too, it is error to charge that the failure to call as a witness a person who was present at the alleged attempt at bribery creates a "presumption" that his testimony would have been unfavorable. No presumption exists against a party for failing to call a witness even though able to do so, but the jury may consider that if called the testimony of the absent witness would not have sustained the defendant's contention.

It is also error to sustain the plaintiff's attorney in the statement that the failure of the defendant to call as witnesses passengers on the car on which the plaintiff was injured raises a presumption against it.

Such erroneous instructions require the reversal of a judgment for the plaintiff although the verdict be not against the weight of evidence if sharp questions of fact were presented and the plaintiff's evidence was open to criticism.

**APPEAL** by the defendant, the Interurban Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of April, 1906, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 23d day

of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*Ferdinand E. M. Bullowa*, for the respondent.

INGRAHAM, J :

The only questions which I deem at all material upon this appeal arise upon exceptions to the charge of the learned trial judge.

Upon the trial a witness named Julia Collins was called for the plaintiff. She testified that one Curry, who was an inspector in the employ of the defendant, and whose duty it was to see witnesses and obtain from them a statement of what they could testify to in reference to accidents, came to the witness and asked her if she would give him a statement, to which she replied that she would ; that she gave him a statement with which he was not satisfied, saying it was not good for the company, and wanted a longer statement ; that the witness told the inspector that that was all she knew ; that he then asked her if she would go for the company and she said, no ; that he said he would fix her up if the company should finally win ; she said, no, no ; she would not, no ; that this conversation was three or four months after the accident ; that although the witness had been examined at a former trial prior to which she had stated these facts to the plaintiff's counsel, she was not examined about them. Curry was called as a witness for the defendant and denied this whole conversation. He stated that he called on the witness and asked her to give him a statement ; that she gave him a statement, but that the rest of her testimony was untrue, and that he had no such conversation with her ; that he saw her in company with a man named Whelan, one of the company's investigators ; that he simply asked her for a statement, which she gave him, and which he turned over to the attorneys for the defendant ; that he did not ask her for another statement and never went back to see her ; that he did not say the statement was good, bad or indifferent for the company, made no comment at all, and asked her no further questions.

In commenting upon this testimony the learned trial judge stated that Curry had testified in substance that after he had obtained a

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statement from his witness he said that "it was not a sufficiently long statement to be of any use to the company, and that if she would make them a further and longer statement—I don't understand that she claimed that he asked her to state any specific thing, or to deny that she had seen what she claimed to have seen—that the company would 'fix it up if the company should finally win.' Curry denies this, and it is for you to say, as I have already stated, *first*, whether he used this language or not, and *secondly*, if he did, whether there was in it by any fair inference, judging from the words themselves and the circumstances, any suggestion on his part of bribery, to induce her to withhold her testimony from the plaintiff or to give a different version of it for the defendant. It has been stated by the highest court in this State that where it appears that on one side there had been forgery or fraud in some material parts of the evidence, and they are discovered to be (the) contrivance of a party to the proceeding, it affords the presumption against the whole of the evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party. It is not conclusive even when believed by the jury, because a party may think he has a bad case, when in fact he has a good one, but it tends to discredit his witnesses and to cast doubt upon his position." To this charge the counsel for the defendant excepted.

This charge was taken in part from 1 Phillips on Evidence (C. & II. & Ed. Notes, 627), which was quoted by the Court of Appeals in the case referred to by the learned trial court (*Nowack v. Met. St. R. Co.*, 166 N. Y. 433); but I think that this quotation without stating the qualification in the opinion, was quite misleading. What the Court of Appeals said was that "Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor, although collateral to the issues, is competent as an admission by acts and conduct that his case is weak and his evidence dishonest. It is somewhat like an attempt by a prisoner to escape before trial, or to prove a false alibi, or by a merchant to make way with his books of account, except that it goes farther than some of these instances, for in addition to reflecting on the case, it reflects upon the evidence on that side of the controversy. 'Where it appears that on one side there has been forgery or fraud in some material

parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole of the evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party.' (1 Phillips on Ev. [C. & H. Notes\*], 627.) It is not conclusive, even when believed by the jury, because a party may think he has a bad case when in fact he has a good one, but it tends to discredit his witnesses and to cast doubt upon his position. It is for the consideration of the jury, after ample opportunity for explanation and denial, under proper instructions to prevent them from giving undue attention to the collateral matter to the detriment of the main issue."

The guarded language here used shows, I think, the limitation as to the effect of such testimony. Assuming in this case that the effect of this statement of the inspector for the defendant was an attempt to improperly influence the witness, the jury should have been carefully instructed that they should give to such a statement of purely collateral matter such effect only as the law gives it. It is said in the *Nowack Case* (*supra*) that such evidence "is for the consideration of the jury, \* \* \* under proper instructions to prevent them from giving undue attention to the collateral matter to the detriment of the main issue." The word "presumption" has a definite meaning, and such evidence never creates a presumption. It is simply a circumstance to be considered by the jury in determining the weight of the evidence. To "presume" is defined by Webster as "to assume" and also as "to take or suppose to be true or entitled to belief without examination or proof;" and a "presumption" is the act of presuming, but the Court of Appeals held the effect of such an attempt to be like an attempt of a prisoner to escape before trial, or to prove a false alibi, or of a merchant to make way with his books of account, except that, in addition, it reflects upon the evidence on that side of the controversy. I think the mere fact that a prisoner attempted to escape before trial would not afford a presumption that he was guilty or that that alone would not justify a jury in presuming his guilt. It is only a fact that the jury is entitled to consider in weighing the evidence, and which creates no presumption either in favor of or against the prisoner.

The other question presented is in relation to the failure of the

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\* See C. & H. & Ed. Notes.—[REP.]

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defendant to produce Whelan whom Curry, the defendant's inspector, testified was present at his interview with the witness Collins as a witness. Curry testified that he went to see her "in company with Mr. Whelan, one of our investigators." In relation to the failure to call Whelan, counsel for the defendant asked the court to charge that there was no evidence that the testimony of the absent investigator, who was with Curry, would be otherwise than cumulative evidence to that already given, and to that request the court seems to have acquiesced. Counsel for the defendant then asked the court to charge that the jury could draw no adverse inference against the defendant because defendant did not produce a witness whose evidence would merely be cumulative to that already given. This the court declined to do, saying: "I will charge this, gentlemen, the rule is that where a party has within his control, or under his control, evidence which he might produce, and which is material to the issue, and he has neglected to do it, it raises an unfavorable presumption as to him." To this charge the defendant excepted.

The learned trial court here used the same word "presumption" that had been used in relation to the act of the investigator to which attention has been called, but it is clear that there is no presumption against a party for failing to call a witness, even though he was able to call him and did not do so. The jury might consider that if called, the testimony of the absent witness would not sustain the defendant's contention of the occurrence as to which he could testify, but that created no presumption against the defendant.

It appears in the record that in summing up, counsel for the plaintiff commented upon the failure of counsel for the defendant to call Whelan as a witness, stating to the jury that it was a rule of law that he who fails to produce a witness who would know of the circumstances which are being testified to, the presumption is against him and the jury may take that presumption and call for the application of the rule which shows a presumption against this defendant because of its failure to produce the other investigator or notary public. Counsel for the plaintiff also called for the application of that principle of law for the reason that the defendant failed to produce the passengers in the car. This claim by the plaintiff's counsel as to the effect of failing to call these witnesses sustained by the court was not justified by the rule.

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There was a sharp question of fact presented as to the liability of the defendant for this injury, and while the evidence would not justify the court in reversing the judgment upon the ground that the verdict was against the weight of evidence, there are circumstances connected with the plaintiff's evidence which subjects it to criticism. It may well be that the jury considered the instructions that they had received as justifying them in assuming that they could act upon the presumption that the court had told them affected the defendant's whole case and based their verdict upon such presumption instead of a consideration of the testimony considered in the light of the incidents which had appeared upon the trial, and which they were only entitled to consider in determining the weight to be given to the evidence. I think, therefore, that the instruction given to the jury, to which attention has been called, requires a reversal of the judgment.

The judgment and order appealed from are, therefore, reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., LAUGHLIN and LAMBERT, JJ., concurred ;  
HOUGHTON, J., concurred on last ground.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

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CHARLES F. GOEPEL, Appellant, v. ROBINSON MACHINE COMPANY,  
Respondent.

First Department, March 8, 1907.

**Practice — when actions should be consolidated — payment of costs by defendant — when attachment in consolidated action should not be vacated.**

An action upon a promissory note brought in the City Court of New York should be consolidated with a prior action upon a promissory note brought in the Supreme Court when the only grounds upon which the consolidation is resisted is the possibility that the plaintiff may get his case upon the short calendar of the City Court and obtain an earlier trial.



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On such consolidation, however, the defendant should pay the costs in the City Court, and an attachment granted in that court should not be vacated even though the plaintiff has obtained security in the prior action in the Supreme Court.

APPEAL by the plaintiff, Charles F. Goepel, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of January, 1907, removing an action from the City Court of the city of New York and consolidating it with the above-entitled action in the Supreme Court and vacating an attachment in the City Court action upon the ground that said attachment became merged with the attachment issued out of the Supreme Court.

*Peter B. Olney, Jr.*, for the appellant.

*Philip K. Walcott*, for the respondent.

INGRAHAM, J. :

The actions in this court and in the City Court were upon promissory notes made by the defendant. The action in this court was commenced on November 9, 1906, and in the City Court on the 7th of December, 1906. There is no reason suggested why these actions should not be consolidated, except that the plaintiff may be able to get the case in the City Court upon the short calendar and have the case tried before the action can be tried in the Supreme Court. The action, however, can be disposed of within a reasonable time in this court, and the controversy upon these notes should be disposed of in one action. The defendant, however, should pay the costs in the City Court action and the attachment granted in the City Court should not have been vacated.

The plaintiff is entitled to the same security for the payment of any judgment to which he will be entitled in the consolidated action that he had in the two actions which were consolidated. The fact that the plaintiff had obtained security in the action commenced in this court is no reason why he should be deprived of the security that he has obtained in the City Court action.

I think, therefore, that the order appealed from should be modi-

fied by requiring as a condition of the consolidation that the defendant pay the costs in the City Court action and that the provision vacating the attachment granted in the City Court be stricken out, and as thus modified affirmed, without costs.

PATTERSON, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order modified as directed in opinion and as modified affirmed, without costs. Settle order on notice.

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JOHN ISTOK, Appellant, v. MARTIN L. SENDERLING, Respondent, and  
GEORGE L. HOUGH, Doing Business under the Firm Name and  
Style of THE SENDERLING MANUFACTURING COMPANY.

First Department, March 8, 1907.

**Practice — examination before trial to prove partnership of defendants.**

When the complaint alleges and the answer denies that the defendants were doing business as copartners and the plaintiff shows that the defendants have filed a certificate in the county clerk's office stating that they intended to do business under the firm name alleged, the plaintiff is entitled to examine the defendants before trial to prove that fact.

That the plaintiff's allegation as to the partnership of the defendants was not upon information and belief or that he had personal knowledge of the fact does not justify the court in refusing an examination before trial.

The Appellate Division is committed to a construction of sections 870 and 872 of the Code of Civil Procedure which will permit a party to an action to take the deposition of an adverse party where it is apparent that his evidence will be material at the trial of the action.

APPEAL by the plaintiff, John Istok, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1906, vacating a prior order for the examination of the defendant Senderling before trial.

*Charles S. Aronstam*, for the appellant.

*Edwin A. Jones*, for the respondent.

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INGRAHAM, J. :

The action was brought to recover the damages sustained by the plaintiff as an employee of the Senderling Manufacturing Company. The complaint alleges that the defendants were doing business under the firm name and style of The Senderling Manufacturing Company. This allegation the defendant denies. Whereupon the fact that these two defendants were doing business under this corporate name was an essential fact that the plaintiff was required to prove upon the trial of the action. The plaintiff, therefore, was entitled to examine the defendants to prove such fact. In the motion papers upon which the order for the examination of the defendant was obtained it is alleged that there is on file in the county clerk's office a certificate filed on September 27, 1900, in which these defendants certify that they were and intended to continue doing business under the name of The Senderling Manufacturing Company, and that there is no subsequent record of any change. The defendant Senderling could testify as to the arrangement under which he did business and a case was, therefore, presented which justified the plaintiff in examining him either before trial, as provided in section 870 of the Code of Civil Procedure, or at the trial. The fact that the allegation of the complaint was not upon information and belief does not justify the court in refusing to allow the plaintiff to obtain by an examination before trial the legal evidence of the relations of the defendant to the accident. The fact that plaintiff had personal knowledge of the facts alleged in the court is no reason why he should not, by taking the deposition of a defendant, procure evidence which he could use upon the trial to establish such allegations. The defendant would be a competent witness on the trial to prove the facts sought to be proved by this examination, and the Code gives to an adverse party the express right to take such a deposition before trial rather than be subjected to the possibility of being unable to subpoena the witness so as to compel his attendance at the trial. This court is committed to a construction of sections 870 and 872 of the Code of Civil Procedure which will authorize a party to an action to take the deposition of an adverse party where it is apparent that his evidence would be material at the trial of the action. (*Goldmark v. U. S. Electro-Galvanizing Co.*, 111 App. Div. 529; *McKeand v. Locke*,

115 id. 174.) The learned judge at Special Term seemed to have thought that the object of this examination was to enable the plaintiff to ascertain whether he had a cause of action. This was clearly a mistaken view of the application. What the plaintiff desires is proof of the fact which he alleges in his complaint and from which his affidavit shows he was justified in alleging.

It follows that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to vacate the order for the examination denied, and the order reinstated; the defendant Senderling to appear for examination at a time to be fixed in the order.

PATTERSON, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied and order reinstated as stated in opinion. Settle order on notice.

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In the Matter of the Application to Set Aside the Agreement of December 30, 1898, in the Estate of BENJAMIN RICHARDSON, Deceased.

EMMA J. RICHARDSON and WILLIAM T. WASHBURN, as Executors of and Trustees under the Last Will and Testament of BENJAMIN RICHARDSON, Deceased, Appellants; VIOLA J. M. KARAM and Others, Respondents.

First Department, March 8, 1907.

**Contract — stipulation settling controversies as to executors' accounts — when surrogate should not set aside stipulation.**

When in settlement of several controversies respecting the accounts of an administrator the parties have entered into a stipulation which embodies a plan of settlement and division of the estate to be carried out with all convenient speed, within six months if possible, and it appears that the executor or his wife have advanced large sums of money to protect the property, relying upon the stipulation, and that many persons interested in the estate, and having acquired rights under the stipulation do not contest the same, and there is no proof that the executors have been guilty of any fraud or improper act except delay, the surrogate is without power to set aside the stipulation.

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While the surrogate may relieve parties from a stipulation relating merely to a proceeding before him, a stipulation of the character described, and much more extensive in its operation, should not be set aside even in so far as it allows the executor's accounts to be passed, if the executor, who has advanced large sums of money, relying thereon, cannot be replaced in his original position, especially when there was no fraud in procuring the execution of the agreement.

APPEAL by Emma J. Richardson and William T. Washburn, as executors and trustees, etc., from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 19th day of December, 1906, resettling an order entered in said Court on the 1st day of November, 1906, setting aside a stipulation or agreement entered into by the executors of the estate of Benjamin Richardson, deceased, and the next of kin and devisees and legatees of the estate, and allowing one of the beneficiaries to file objections to the account of the executors.

*Robert C. McCormick*, for the appellants.

*George H. Mallory*, for the respondent Viola J. M. Karam.

INGRAHAM, J.:

Benjamin Richardson, the testator, died on the 20th day of February, 1889. He left a last will and testament which was admitted to probate, by which William T. Washburn and Emma J. Richardson were appointed executors. By this will, after leaving some legacies and devising some real estate, the testator gave to his executors in trust the residue of the real estate and to his granddaughter, Ella Birdsall, the residue of his personal estate. He directed his executors to sell all said real estate, from time to time, as the same could be sold to advantage, and out of the proceeds thereof to pay his just debts and the incumbrances upon said real estate, and after all of the said debts, incumbrances and legacies had been paid, to pay the balance remaining to such of his children as should be living at the time of his death. The executor and executrix qualified. Finally an application was made to compel them to account and thereupon an account was filed; objections thereto were filed, which were referred to a referee. The proceeding before the referee upon this accounting continued until some

thing over 4,000 pages of testimony were taken. The executors also filed a second, third and fourth account, objections to which were also filed, and which were referred to the same referee. In the year 1894 one of the beneficiaries made an application to remove the executors, but that proceeding does not seem to have been decided. In December, 1898, a proposal was made for a settlement of the matter in controversy and for a winding up and distribution of the estate. The hearing before the referee was suspended and what was called a stipulation was entered into which embodied a plan of settlement. This plan consisted of eight clauses and was apparently signed by the legatees, devisees and all those interested in the estate, including the petitioner and the attorneys for the respective parties. The first clause allowed Mr. Washburn (one of the executors) to wind up the estate, sell the real property, adjust the claims against the estate, except those therein specified, and cause them to be paid, and divide the balance in accordance with the terms of the will with all convenient speed and during the next six months if possible. The second clause provided that the net amount due Mr. Washburn's family (consisting of William T. Washburn, Emma J. Richardson and Mary R. Washburn) from the estate of Benjamin Richardson, deceased, for cash advances and loans both secured and unsecured, made by them to it, was adjusted at the sum of \$38,004.04 on the 10th day of September, 1895, when the executors filed their fourth account, which sum with interest to the 6th day of August, 1898, amounted to the sum of \$45,334.03, when by the receipt of Mary R. Washburn of the sum of \$8,333.40 from the proceeds of the sale of the One Hundred and First street property, the same was reduced to the sum of \$37,000.65, "which shall be considered as the amount due on said last mentioned date for said advances and loans and is, with interest secured by the triplicate mortgage given by the executors and heirs of Benjamin Richardson to Mary R. Washburn." It was then agreed that no proceedings should be taken by the said Mary R. Washburn or by any future holder of said mortgage to enforce the same prior to the 1st day of January, 1900. It was then provided that upon a sale of the property covered by the mortgage one-half of the net proceeds of such sale or sales should, after the payment of all prior

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liens on the property so sold, be applied to the payment of the indebtedness secured by the triplicate mortgage; and the property so sold should be released from the lien thereof so soon as said Mary R. Washburn or her assigns should have received from such sale or sales, or from any other assets or property of said estate a sum of money sufficient to pay the amount so secured by said mortgage and interest thereon. It was further provided that certain other mortgages held by Mary R. Washburn should be canceled and discharged of record, and that certain actions specified should be discontinued; that the executors were to take no proceedings to enforce the restitution of the various sums of money paid to the heirs and others on their order, consent or assignment by the chamberlain of the city of New York pursuant to the orders made in different actions in the Supreme Court; that the accounts of the executors on their first accounting then referred to the referee should be passed and the reference closed, and the amount of Mr. Washburn's bill for professional services rendered to Benjamin Richardson, deceased, should be allowed at \$15,000 without interest, and the fees of the referee and stenographer should be paid out of the funds of the estate as soon as possible; that the account of the executors contained in their second, third and fourth accountings should be adjusted and passed as soon as possible; that all proceedings brought by the heirs against the executors should be discontinued. Provision was also made for the sale of the remaining real property as soon as possible; that Mr. Washburn was to cause a certain mortgage held by the Chapman estate on certain dock property belonging to the estate to be extended or transferred to parties who would not press for immediate payment, and that he would, if it became necessary, provide funds to meet the pressing necessities of the estate. This agreement was submitted to the referee, but nothing seems to have been done by him until December, 1902, when he returned this stipulation to the court, and the accounts of the executors were allowed and settled. It was alleged by the petitioner that none of the provisions in this agreement or stipulation were carried out by the executors. The executor denied most of the allegations of these petitioners, except as to the delay, which he excused upon the ground that it was impossible to sell the other property of the estate and close up the estate for various reasons. One was that there is a large

judgment in favor of the estate against the city of New York, which is on appeal and cannot be disposed of until that appeal is determined; that all the property has not been sold because of the fact that some of it is unsalable, and because the title of some is in dispute. There are many other people interested in the estate besides the petitioner, who have acquired rights under this agreement. They do not seem to have taken any part in this proceeding, and I do not find that they have had notice of this application. Various items are set up in the moving papers, as to which it is alleged the executors have not accounted, or in relation to which their accounts are improper; but it is not alleged but that all of these facts were known to this petitioner and the others interested in the estate when the agreement was executed. She was at that time represented by counsel, who also signed it. There are no false representations alleged which would justify the setting aside of the agreement, and it would appear that the executor or executrix, or the wife of the executor, have advanced to the estate, based upon this agreement, large sums of money to protect the property of the estate, and which will place the executor in a very different position in regard to this property if this stipulation is set aside. From the statements of the executor, which do not seem to be disputed, it seems that this estate was very largely incumbered by mortgages, liens and judgments, and while the delay in settling the estate has been very great, on these papers I do not see that it can be said that the delay has been caused by any fraudulent or improper acts of the executor. There was no investigation of the facts alleged in this petition and denied by the executor. The allegations in the petition are general and indefinite, consisting only of general allegations of wrongdoing, all denied specifically by the executor; but the surrogate has set aside an instrument under which the parties to this estate have acquired rights that have been acted upon without objection for over eight years, without any competent evidence that these executors have done anything that is improper or been guilty of any fraud, or which justifies any action, except unsupported, indefinite allegations in a petition, which are positively denied.

I do not think that the surrogate had power to make any such order. While the surrogate would have power to relieve the par-



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ties from a stipulation which had relation merely to a proceeding pending before him, this stipulation or settlement of a controversy was much more extensive than that. It is true that it provided that the accounts of the executors should be passed and allowed as submitted by them; but that was a small part of the agreement and was an incident to or consideration for the settlement of the controversy, the provisions of which he swears he has fully performed, and which certainly, so far as advancing many thousands of dollars and delaying the enforcement of mortgages, which represented moneys advanced by him for the protection of the estate out of his own resources, have been fully performed. Under the circumstances, the surrogate could not thus summarily dispose of the rights acquired by those interested in the estate, under the guise of relieving the parties from a stipulation made in his court in relation to the executors' accounting. To set aside the stipulation so far as it allowed the executors' accounts to be passed, without replacing the executor in the position that he was in at the time the agreement was made and repayment to him of the moneys that he had advanced for the benefit of the estate, would be contrary to all principles of equity, especially where there is no fraud alleged in procuring the execution of the agreement.

It is clear that this instrument cannot be set aside in this proceeding, and the order appealed from should, therefore, be reversed, with ten dollars costs and disbursements, payable by the petitioner, and the proceeding dismissed, with costs.

PATTERSON, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and proceeding dismissed, with costs, payable by respondent. Order filed.

ROBERT R. PERKINS, Respondent, v. JAMES H. ALDRICH and Others,  
Defendants, Impleaded with JACOB B. UNDERHILL, Appellant.

First Department, March 8, 1907.

**Principal and agent—broker's action for commissions—when broker not procuring cause of sale—broker cannot act for both parties.**

In a broker's action for commissions it appeared that he was first engaged by the purchaser to appraise the property, and was thereafter authorized by the intending purchaser to make an offer to the seller, who was acting as executor, which offer was declined on the ground that the property must be sold at auction. The plaintiff did not disclose his principals, and testified that the defendant offered him commissions if he would have his principal's attend the sale and they were successful bidders. The plaintiff reported to his principals that their offer was refused, and it was decided that the plaintiff should not attend the auction, but that the bidding should be made by another party, who appeared at the sale and obtained the property at a lower figure than the offer. It further appeared that the plaintiff had been compensated by the persons for whom he had appraised the property, and that the purchaser had determined to buy the property if it could be had at a reasonable figure before employing the plaintiff to appraise it.

*Held*, that the plaintiff was not the procuring cause of the presence of the buyer at the sale, and performed no service which entitled him to commissions;

That his claim against the seller for commissions was entirely inconsistent with his relations with the purchaser, as he could not act for both.

APPEAL by the defendant, Jacob B. Underhill, from a judgment of the Supreme Court in favor of the plaintiff against said defendant, entered in the office of the clerk of the county of New York on the 23d day of April, 1906, upon the verdict of a jury, the complaint having been dismissed by direction of the court as to the other defendants, and also from an order entered in said clerk's office on the 24th day of April, 1906, denying said defendant's motion for a new trial made upon the minutes.

*Evan Shelby*, for the appellant.

*John H. Mulchahey*, for the respondent.

INGRAHAM, J.:

The complaint alleges that the defendants, the executors under the last will and testament of one Elizabeth W. Aldrich, deceased, advertised for sale at public auction on October 25, 1905, certain real property upon Broadway in the city of New York, which was a portion of her estate; that the plaintiff was authorized by the

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Hamburg-American Steamship Company to make an offer to the defendants to purchase it at private sale for \$1,300,000 which offer the defendants declined; that defendants entered into an agreement with the plaintiff, wherein and whereby they agreed that, in consideration of his securing the attendance of the person who had made such offer as a bidder at the auction sale of the said property, and in the event of its being the highest and successful bidder at such sale, the defendants would pay the plaintiff a sum equal to one-quarter of one per cent of such bid; that the plaintiff duly performed all the conditions of said agreement on his part; that the said Hamburg-American Steamship Company was the highest and successful bidder at such auction sale, said premises being struck off to it for \$1,200,000, and plaintiff asks judgment against the defendants for \$3,000.

The defendant Underhill answered, admitting that the defendants were executors under the last will and testament of Elizabeth W. Aldrich, deceased, and that the defendants advertised for sale at public auction on October 25, 1905, the premises mentioned in the complaint, but denied each and every other allegation contained therein.

Upon the trial the plaintiff testified that he was a real estate broker and was employed by a Mr. Sternfeld, representing the Hamburg-American Steamship Company, to appraise this property on Broadway which had been offered for sale at auction by the defendants; that on October 24, 1905, plaintiff had a conversation with the defendant Underhill and offered \$1,300,000 for the property at private sale; that Underhill stated that he did not feel that the executors could accept any offer at private sale for the property, and that they would let it go to the advertised sale; that he appreciated the plaintiff's services in tendering the offer and said: "You keep these parties in line, have them attend the sale, and if they are the successful bidders we will give you one-quarter of one per cent commission;" that after the conversation the plaintiff reported to Mr. Sternfeld that defendants had refused the offer, and that there were two ways to proceed; that the plaintiff could attend the sale and bid for the property on behalf of the Hamburg-American Company, or it could allow some one else to bid at the sale; that in his judgment it would be better either for plaintiff not to appear at the sale at all and retain some one else to represent them there, or else

that the plaintiff should appear at the sale and bid up to \$1,300,000, and should then retire and allow some one else to take up the bidding at that point if it was necessary to go beyond that figure; that Mr. Sternfeld said he would talk the matter over with his client, Mr. Boas, and let the plaintiff know the following morning what they decided to do; that on the following morning the plaintiff again saw Mr. Sternfeld who told him that he had talked the matter over with Mr. Boas and some other people connected with the Hamburg-American Company, and they had decided that it would be judicious for the plaintiff not to appear and that they would have some one else bid at the sale; that at the conversation with Underhill reference was made to the difficulty of getting the people whom plaintiff represented to attend the sale, and Underhill then made the offer to pay plaintiff the commission; that the plaintiff then said, "Well, I don't know as I can get my people to attend the sale; they will naturally be a little piqued in having this offer which they have made turned down, and it is possible that they won't come there at all, but I will see whether they will or not, I will do my best." On cross-examination, the plaintiff testified that he had no interview with any of the executors except Underhill, and that he had no other conversation with the proposed purchasers except the conversation with Mr. Sternfeld to which he had testified. Plaintiff refused to tell Underhill the name of the person who had the offer, and did not disclose the fact that he had been employed by the person who made the offer and that he had appraised the property at \$1,500,000. Plaintiff then introduced in evidence a letter dated October 25, 1905, which was sent by Sternfeld to the plaintiff after the latter's interview with Underhill but before the sale, which stated that the reasons why it was impossible for the Hamburg-American Company to request plaintiff's attendance at the sale had been fully stated to him; that "owing to my instructions, I am compelled to request you and to ask you not to be present, and leave to me entirely the matter of your compensation, which will be within \$150 00." Plaintiff further testified that he received as a gift from Mr. Sternfeld the \$150 mentioned in this letter, and that he had called on the defendant Underhill after the sale and showed him the letter that he received from Sternfeld, to which attention has been called.

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Mr. Boas was then called as a witness for the plaintiff, and testified that he was the general manager of the Hamburg-American Steamship Company and president of the Atlas Line Mail Steamers, these two companies being intimately connected with each other; that he attended the sale of this Broadway property on October twenty-fifth and purchased the premises for \$1,200,000; that he purchased it for the Hamburg-American and Atlas Line Steamship Companies; that prior to that time he had authorized Mr. Sternfeld as his agent to make an offer at private sale of \$1,300,000 for the same property, and subsequently ratified that authority to plaintiff; that prior to the sale he had been told that the offer of \$1,300,000 had been rejected; that the witness subsequently assigned his purchase to the Atlas Line Steamship Company, and title to the property was taken by that corporation; that the witness had seen the advertisement of this property and had considered purchasing it before he heard from or saw the plaintiff; that the director-general of the Hamburg-American Steamship Company was present about a week before the sale, when the witness had seen the plaintiff and Mr. Sternfeld, which was before he had made the offer, and received the plaintiff's appraisal of the property at \$1,500,000, and that that statement had influenced him in making the offer of \$1,300,000; that he subsequently authorized Sternfeld to bid as high as \$1,500,000 for the property; that while the plaintiff's statement had an influence in determining the amount to which he would bid, he did not rely entirely upon plaintiff's valuation in determining that amount; that it was his purpose in purchasing this property, if he could get it at what he considered a reasonable figure, he would purchase it at private sale, and, failing in that, to purchase it at the auction.

Plaintiff having rested, the complaint was dismissed as to all of the defendants except Underhill, the court denying the motion to dismiss as to him. The defendant Underhill moved to dismiss the complaint on the ground that Mr. Boas had made up his mind to purchase the property; that he made the offer through the plaintiff, which was not accepted, and that Mr. Boas had then determined to buy the property at the sale; that the plaintiff had received \$150 from the Hamburg-American Company as compensation for his services, and he could not recover two commissions for the same service from different parties to the transaction. This motion was

denied upon the ground that there was a question of fact for the jury, to which defendant excepted.

Underhill was then called as a witness and testified that the plaintiff made him an offer of \$1,300,000 for the property, but refused to tell him the name of his customer; that the offer was refused, and the witness stated to the plaintiff that if his customer wished to purchase the property they could come to the auction and bid; that plaintiff then stated that his customer would not come to the auction; witness then asked the plaintiff if he could persuade his people to come to the auction, to which the plaintiff responded that he did not know; that the witness then said, "If you can persuade them to go to the auction and they are the successful bidders, and they buy the property, and at the time they buy the property they hand the auctioneer your card, I will give you a quarter of one per cent;," that the plaintiff then said, "Suppose I should bid for the property myself, wouldn't that be very good evidence?" to which witness said, "that would be just as good." Mr. Underhill's statement of the conversation was corroborated by Mr. Kennelly, who had represented him as a real estate broker in the transaction.

At the end of the whole case the defendant again moved to dismiss the complaint, which motion was denied. The court submitted the case to the jury, instructing them that unless they were satisfied that through the efforts made by the plaintiff after the 24th day of October, 1905, the attendance of the successful bidder was secured, he could not succeed; that if after the agreement made on October twenty-fourth the plaintiff did in fact secure such attendance of the successful bidder at the sale, he performed his contract in so far as his services or efforts were necessary to the earning of compensation. The jury found a verdict for the plaintiff. The defendant made a motion for a new trial upon the ground, among others, that the verdict was against the weight of evidence; and the defendant has appealed from the judgment and the order denying the motion for a new trial.

The question whether there was evidence to sustain a finding that the plaintiff secured the attendance at the sale of the person who had made the offer of \$1,300,000, and who became the purchaser of the property, is, therefore, presented. The evidence is undisputed that before the plaintiff had any connection with this

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transaction Mr. Boas, as the agent of the Hamburg-American and its allied company, had determined to purchase this property if it could be secured at what he considered a reasonable price; that the plaintiff was employed by Mr. Boas, through his agent, to appraise the property, and reported to Mr. Boas that it was worth \$1,500,000; that Mr. Boas determined to make an offer of \$1,300,000 for the property at private sale, and, if that offer was declined, to purchase the property at the sale if it could be secured for \$1,500,000; that he then authorized the plaintiff to make the offer of \$1,300,000, and when that offer was rejected Mr. Boas terminated plaintiff's connection with the transaction, paid him for the services that he had rendered and personally undertook and completed the purchase of the property.

As I view this transaction there was no evidence that this plaintiff secured or had any relation to securing the presence of Mr. Boas at the sale or performed any service in that respect which entitled him to compensation. It is not even claimed by the plaintiff that he first called Mr. Boas' attention to this property or that Mr. Boas was his customer, and the evidence is uncontradicted that prior to the plaintiff's connection with the property there had been negotiations between Mr. Boas and the executors in relation thereto through Mr. Merriam and Mr. Sternfeld, who were both connected with Messrs. Alexander & Colby, a firm of attorneys in New York city. Under this employment plaintiff's duty was primarily to Mr. Boas. He was bound to act in good faith towards him and endeavor to obtain the property for the lowest possible price. The relation that existed was entirely inconsistent with his representing the defendant in relation to the sale of the property, for as representative of the defendant it was his duty to obtain for him the best price possible. He could not consistently represent both. Plaintiff carefully concealed from the defendant his relation to the purchaser, refusing to disclose his name. After the offer made by the plaintiff on behalf of the Hamburg-American Company was rejected, all that the plaintiff did was to see Mr. Sternfeld, the agent of Mr. Boas, and make an obvious suggestion that if Mr. Boas wanted to buy the property he could either employ plaintiff to attend the sale and bid or he could send some one else to the sale for that purpose. There was here no solicitation or inducement to Mr. Boas to attend

the sale, and nothing that he said to this agent could in any way influence Mr. Boas in relation to a subsequent purchase of the property, and the evidence is clear that nothing the plaintiff did had any effect upon Mr. Boas or the Hamburg-American Company or anybody else in relation to the purchase of the property at the auction sale. Mr. Boas, who was called by the plaintiff, expressly testified that before he made the offer he had resolved to purchase the property if it could be secured for \$1,500,000. The court in its charge to the jury held as a matter of law that the evidence must establish to the satisfaction of the jury that "through the efforts made by him (plaintiff) after the 24th day of October, 1905, the attendance of the successful bidder was secured" before the plaintiff could recover. The evidence is conclusive that the plaintiff made no efforts to procure the attendance of Mr. Boas at the sale and that nothing that he did had any effect upon the attendance at the sale or the purchase of the property. The contract as testified to by the plaintiff contemplated the rendition of services by him and it was for the services to be rendered by him that he was to be paid. The promise was based upon the statement of the plaintiff that he did not know whether he could get his people to attend the sale. It was upon his promise to see whether they would attend the sale and to do his best to induce them to attend that the promise of the defendant was made. To entitle him to recover the compensation agreed to be paid for the rendition of such services, he must at least show that he did something, and that what he did has some relation to or effect upon the attendance of the person who made the offer at the sale and his purchase of the property. In the absence of any attempt by the plaintiff to induce Mr. Boas to attend the sale or to purchase the property, he performed no service which entitled him to compensation.

It follows, therefore, that the verdict was not sustained by the evidence, and that the judgment and order are reversed and a new trial ordered, with costs to appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN and CLARKE, JJ., concurred ; SCOTT, J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.



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## THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GEORGE B. McCLELLAN, Appellant.

First Department, March 8, 1907.

**Quo warranto — determination of Attorney-General not to bring action is not binding on successor — practice — when defense of prior determination should be taken by motion.**

The bringing of an action of quo warranto against a person who usurps or unlawfully holds a public office is in the discretion of the Attorney-General. A decision by a prior incumbent of the office that the action should not be brought is not *res adjudicata* or binding upon his successor.

When the Attorney-General has served a summons and complaint in an action of quo warranto the questions as to whether the action was barred by the decision of his predecessor and whether service should be set aside should be raised by motion and not by answer or by plea in bar.

APPEAL by the defendant, George B. McClellan, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of February, 1907, as denies the defendant's motion to set aside the summons and complaint herein and the service thereof as unlawful and unauthorized.

*Eugene Lamb Richards, Jr.*, for the appellant.

*Charles A. Dolson*, for the respondent.

INGRAHAM, J. :

The People, by the Attorney-General, commenced this action, alleging that an election was held in the city of New York on the 7th day of November, 1905, at which the defendant was declared elected mayor of said city, and has since occupied that office, but that at such election the greatest number of legal votes was cast for one William Randolph Hearst, and he was duly and legally elected mayor of the city of New York for the term of four years, commencing on the 1st day of January, 1906; that the defendant has usurped and intruded into and now holds such office of mayor of the city of New York, and judgment is demanded that the said William Randolph Hearst be declared duly elected to the office of mayor, and that the defendant be ousted and excluded from said

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office. Upon an affidavit which alleged that on the 17th day of April, 1906, the said William Randolph Hearst, claiming that he had been elected mayor of New York at such election, petitioned Julius M. Mayer, then Attorney-General of the State of New York, that he should bring or cause to be brought an action in the nature of quo warranto to test and determine the title of the defendant to the said office of mayor of the city of New York; that the defendant and the said Hearst duly appeared before the Attorney-General upon that application, and the Attorney-General had a hearing thereon and received and took the proofs appertaining to the issues raised thereby, and after due and deliberate consideration of the said petition, answer and evidence so adduced before him, made a determination on the 16th of July, 1906, denying the application of the said William Randolph Hearst to have an action in the nature of quo warranto brought in the name of the People of the State of New York, and refusing to bring any such action. The defendant claims that such adjudication by the then Attorney-General was *res adjudicata* as to whether an action should be brought by the People of the State to test the title of the defendant to the office of mayor under the election of the 7th of November, 1905, and becomes, therefore, binding upon the present Attorney-General, successor to Attorney-General Mayer, and that he had, therefore, no authority to commence this action; and upon this affidavit the defendant made a motion at Special Term that the service of the summons and complaint should be set aside and dismissed as unlawful and unauthorized. This motion was denied, and the defendant appeals.

The learned judge at Special Term denied the motion upon the ground that the question could not be raised on motion; that if the contention of the defendant was available, it was only as a bar to the maintenance of the action, and that the bar must be pleaded by way of answer. I should be inclined to think that this objection could not be taken by answer or by a plea in bar, but could only be raised by a motion to set aside the service of the summons and complaint. There could be no question but that upon the allegations of the complaint the plaintiff has a good cause of action. Whether or not the People of the State of New York would enforce that cause of action was a question that was to be determined by the Attorney-General under the provisions of the statute

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regulating the performance of his duties. If it was improper for the Attorney-General to commence the action, or if there was any statutory or other bar to his using the name of the People of the State for that purpose, it would seem that the way that the question could be raised would be by a motion to set aside the service of process which was unauthorized by the People. The fact that the Attorney-General had exceeded his authority in commencing the action in the name of the People of the State could not be available as a defense to the action if the complaint set up a good cause of action. I think, therefore, that the question which we must determine is, whether there was any determination of Attorney-General Mayer which was a bar to his successor in acting under the authority vested in him by law in bringing this action.

Subdivision 1 of section 52 of the Executive Law (Laws of 1892, chap. 683, as amd. by Laws of 1895, chap. 821) provides that the Attorney-General shall prosecute and defend all actions and proceedings in which the State is interested. He is, therefore, the law officer of the State, by whom all actions brought by or on behalf of the People of the State must be prosecuted. The action of quo warranto is regulated by title 1 of chapter 16 of the Code of Civil Procedure. Section 1948 provides that the Attorney-General may maintain an action upon his own information or upon the complaint of a private person in either of the following cases: "1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, within the State, a franchise or a public office, civil or military, or an office in a domestic corporation." Section 1986 provides that "where an action is brought by the Attorney-General, as prescribed, in this title, on the relation or information of a person having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person." There is no provision of law which limits or restricts the Attorney-General in the exercise of his discretion as to whether an action by the People of the State shall or shall not be brought. He can bring an action upon his own information, or on the complaint of another person, the only limitation on his action being that if it be brought on the complaint of another person, that fact must appear in the complaint, and the Attorney-General is then to require the party at whose

instigation the action was brought to secure the State against any liability for costs. It seems to me that in determining whether or not an action shall be brought, the Attorney-General acts under a discretion vested in him by law, which is not in any sense made to depend upon the result of a judicial investigation, but is solely an exercise of the discretion vested in him as the law officer of the State. He may bring, and it is his duty to bring, the action when he is satisfied that the law has been violated and a person is exercising a public office or a public franchise without authority or legal title to the office or franchise. The question is one submitted to his discretion, and he must exercise that discretion upon the facts as they appear to him from time to time when brought to his attention. From the very nature of the discretion vested in him, it seems to me impossible to say that he exercised at any time a judicial function, or that any determination becomes an adjudication which is binding upon him or upon anybody else. The question not being judicial in its nature, the fact that one Attorney-General determined that he was not justified in commencing an action is no bar to the same Attorney-General, or to his successor, in subsequently determining that the facts as then presented to him require him to institute the action.

None of the cases cited by the learned counsel for the defendant have any application, as they all relate to proceedings of boards or public officers who are charged by law with the determination of questions to be submitted to them, and where their determination is judicial in character, and not an act resting purely in discretion, and upon which it is made the duty of the public officer to exercise his discretion from time to time as the circumstances require.

For these reasons I think the order below was right and should be affirmed, with ten dollars costs and disbursements. It is only proper that we should add that we think this is a question which should be determined by the Court of Appeals, and that, on application by the defendant, the question will be certified to that court.

PATTERSON, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

JAMES THEDFORD, Respondent, v. HENRY L. HERBERT, Appellant.

First Department, March 8, 1907.

**Sale — correspondence not establishing contract.**

In an action to recover damages for the breach of an alleged contract to sell and deliver coal, it appeared that after a conversation with the defendant's brother as to the terms of the alleged contract plaintiff was directed to confirm it in writing; that thereupon he wrote to the defendant: "In accordance with my conversation with you \* \* \* you may enter my order for about 1,000 tons of broken coal per month for shipment previous to February 1. \* \* \* For the next three or four months I may not be able to take my full monthly quota, but shall live up to my obligations as nearly as possible." The defendant did not reply to this letter, and thereafter the plaintiff wrote asking when "can I expect some furnace coal on my order." The plaintiff testified that the letter contained the entire agreement as he understood it. On all the evidence,

*Held*, that as it was not stated in the letter that a contract had been made the day before, and as the proposals of the letter were never accepted, there was no contract binding upon either party;

That, although the defendant had subsequently delivered two small orders of coal, the evidence did not justify a finding that the deliveries were made under the alleged contract.

APPEAL by the defendant, Henry L. Herbert, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of October, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 17th day of October, 1906, denying the defendant's motion for a new trial made upon the minutes.

*L. E. Warren*, for the appellant.

*George H. Fletcher*, for the respondent.

INGRAHAM, J. :

This action was brought to recover damages sustained by the breach of a verbal contract alleged to have been made on April 30, 1902, for the sale by the defendant of 9,000 tons of coal, 1,000 tons to be delivered in each month until the 1st of February, 1903, at three dollars and ninety cents per ton. To prove the contract the plain-

tiff testified that he first called on the defendant on April 30, 1902, and had a conversation with the defendant's brother, at which the defendant was present; "I told him that I came down to conclude the contract for the purchase of coal. \* \* \* I told Mr. Herbert that I would take a thousand tons a month until the 1st of February, 1903, and Mr. Herbert asked me if I would not make it fifteen hundred tons and I told him no, that a thousand was all that I could take care of; and he said, 'Well, all right; when you get back to your office, you confirm that in writing and we will ship you the coal right along as you want it.' \* \* \* I told him that Mr. Randolph called and offered me this coal, and that he asked me to come down; that they wanted to see me in reference to it, for me to buy the coal myself. The coal was to be delivered at my dock; I stated respecting the place of delivery. Mr. Herbert said, 'All right.'" The witness further testified that on the following day he wrote a letter to the defendant, which was introduced in evidence. That letter was as follows:

"NEW YORK, *May 1st*, 1902.

"MESSRS. H. L. HERBERT & CO.:

"GENTLEMEN.—In accordance with my conversation with you of yesterday you may enter my order for about 1,000 tons of broken coal per month for shipment previous to February 1st, 1903, at 3.90 per ton gross tons alongside within limits.

"For the next three or four months I may not be able to take my full monthly quota, but shall live up to my obligation as nearly as possible.

"Terms 30 days.

"I would also remind you that I would be glad to unload any coal you may have for delivery in my locality.

"Yours truly,

"JAMES THEDFORD."

The plaintiff testified that he received no answer to this letter; that the defendant shipped him two cargoes of coal, one on the fifth and the other on the sixth or seventh of May, which amounted to 560 tons, and for which he paid. The next communication between the parties of which there is any evidence was dated December 3, 1902, and reads as follows:

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*"NEW YORK, Dec. 3d, 1902.**"Messrs. H. L. HERBERT & Co. :*

*"GENTLEMEN.—* When can I expect some furnace coal on my order; from what Mr. Randolph said to me I thought I would have a cargo this week.

*"Please let me know when I will get some, And oblige*

*"Yours very truly,*

*"JAMES THEDFORD."*

The plaintiff testified that he made demands for the delivery of the coal over the telephone about two or three times, without specifying the person with whom he communicated or the time when the demand was made. Upon cross-examination, he testified that this letter written on May 1, 1902, contained the entire agreement, as he understood it, that he had made on the previous day; that he did not see either of the Herberts from the thirtieth of April until after he wrote the letter of December 3, 1902, except once, about the twenty-fifth of October, at which interview this defendant was not present; that this interview might have been in November, and not in October. This was all the testimony offered by the plaintiff as to the contract; and after some testimony as to the price of coal during these months, the plaintiff rested. The defendant then moved to dismiss the complaint on several grounds, one of which was that this alleged contract was void under the Statute of Frauds.

On behalf of the defendant, it was proved that the Mr. Randolph mentioned was not and never had been in the defendant's employ; that the plaintiff saw the defendant's brother and stated that he wanted some broken coal, and heard that the defendant would probably have some; that he did not know how or in what quantities he would want it; that when asked how much he wanted he stated that he did not know, but he "might want nine thousand tons, or about that;" and thought he would want it at about 1,000 tons a month; that the defendant's brother replied that defendant could not let the plaintiff have that amount, but could let him have a little at a time if defendant had the coal, but that it looked very much as though they were going to have trouble with the mines and he did not know for certain how long they were going to have a supply; that defendant told plaintiff that the price at that time would be three dollars and ninety cents alongside at his dock; that

there was no agreement to let the plaintiff have 1,000 tons a month, commencing in May, 1902, and ending in February, 1903; that some days afterwards the plaintiff called the defendant's office up on the telephone and wanted to know if he could get a small cargo of broken coal; that it was stated in reply that defendant could get him a load in a couple of days, and defendant did deliver a cargo to the plaintiff; that defendant subsequently shipped at plaintiff's request another cargo of coal, which was delivered on May 7, 1902, and from that time down to December the defendant never heard anything from the plaintiff in reference to wishing more coal delivered. The defendant testified that he never saw the plaintiff, made no contract with him, never had a word of conversation with him, and never heard of any conversation between him and Mr. George I. Herbert, defendant's brother, and saw the plaintiff for the first time in court. Mr. Randolph, who was mentioned by the plaintiff in his testimony, was then called as a witness and stated that he never made or pretended to make any contract on behalf of the defendant; that he called upon the plaintiff and told him that the defendant had some broken coal they would sell at three dollars and ninety cents.

The parties having rested, the defendant renewed his motion to dismiss the complaint upon the same grounds, which motion was denied and defendant excepted. The defendant then asked the court to charge that if the contract alleged was correctly set forth in plaintiff's Exhibit 1, as testified to by the plaintiff, it was void for uncertainty and the plaintiff could not recover. That request was refused and defendant excepted. The defendant then asked the court to charge that the contract as testified to by the plaintiff was, in the first instance, void by the Statute of Frauds. That request was also refused and the defendant again excepted. The defendant then asked the court to charge that no verdict could be found or predicated upon the ground of defendant's silence in reply to the letter of May 1, 1902. That request was also refused and the defendant excepted. The jury then found a verdict for the plaintiff for \$15,000. In the charge the court instructed the jury that if the defendant "agreed with the plaintiff upon the terms of the sale and that pursuant to such terms and agreement the plaintiff wrote the letter that has been referred to here as of May 1st, 1902; and that the



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two shipments of coal followed pursuant to that understanding, why, then there was a contract between these parties."

It seems to me that there was no enforceable contract. Assuming the plaintiff's testimony to be correct, the first interview with defendant's brother was an offer to purchase about 1,000 tons a month, beginning May 1, 1902, and to continue until February, 1903. The kind or size of coal that was to be delivered and the terms of payment were not mentioned, and it was the intention of the parties that the conversation was to be followed by a written agreement in which the details were to be specified. It is not disputed but that at this time there was great uncertainty in the coal business on account of a threatened strike of the coal miners, which strike took place a few days after this interview. Accepting the letter of the plaintiff to the defendant which was written in pursuance of this conversation and which the plaintiff testified was a correct statement of the conversation as he understood it, it was therein stated that the defendant could enter his order for about 1,000 tons of broken coal per month for shipment previous to February 1, 1903, qualified with this statement, that "for the next three or four months I may not be able to take my full monthly quota, but shall live up to my obligation as nearly as possible." The plaintiff then made his offer to make a contract, submitting the terms to the defendant, which, upon acceptance by the defendant, would make a binding contract. There is no statement in the letter that a contract had been made the day before, but that defendant might enter plaintiff's order for the coal. This letter was never accepted or any contract based upon it made, and it is clear that neither party then considered that there was a binding contract. The subsequent conduct of the parties strongly corroborates this view. From May until December it was almost impossible to get coal of this character in New York in consequence of the miners' strike, the price of coal being largely in excess of that which was discussed by the parties in relation to this order. Yet during all that time there was no demand by the plaintiff on the defendant for any coal, or statement by the plaintiff that a contract was in force. The very indefinite testimony of the plaintiff that he ordered coal several times by telephone is entirely insufficient to prove any demand. It plainly appears from the whole evidence that no express contract, either to deliver or receive coal,

was made by this conversation, and the failure of the defendant to accept the plaintiff's offer contained in his letter of May 1, 1902, without a subsequent demand for an answer or for some memorandum from defendant, is strong evidence that it was not understood that there was an actual contract.

Nor do I think the evidence justified a finding that any coal was delivered by the defendant under the conversation of April 30, 1902. The two deliveries of coal made in May were not demanded as a delivery under any contract. There is no evidence that a contract was alluded to when the coal was ordered, or that either party understood that a claim was made by the plaintiff that there was an existing contract.

It follows, therefore, that the verdict of the jury that there was a contract for the sale of this coal was not sustained by the evidence, and that the judgment and order are reversed and a new trial ordered, with costs to appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

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THE WASHINGTON TRUST COMPANY OF THE CITY OF NEW YORK,  
Respondent, v. CHRISTOPHER C. BALDWIN, Defendant.

WILLIAM WOODWARD BALDWIN, as Executor, etc., of CHRISTOPHER  
C. BALDWIN, Deceased, Appellant.

First Department, March 8, 1907.

**Practice — revival of action — application denied for laches.**

In an action at law there is no fixed time within which the action may be revived against the executor of a deceased defendant. The time within which an action in equity can be revived is ten years.

But although there is no fixed time within which application to revive an action at law must be made, the court may deny the application for laches, and where, without excuse, a party delays until the Statute of Limitations would have barred the action, a motion to revive it should be denied.

HOUGHTON, J., dissented, with opinion.

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First Department, March, 1907.

APPEAL by William Woodward Baldwin, as executor, etc., of Christopher C. Baldwin, deceased, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of December, 1906, granting the plaintiff's motion for leave to revive and continue the above-entitled action against the said executor.

*Maunsell B. Field*, for the appellant.

*W. C. Percy*, for the respondent.

INGRAHAM, J. :

This action was commenced in 1896 upon a demand note dated October 1, 1895. No answer was interposed by the defendant and no judgment was entered. The original defendant made payments on account. He died, however, on May 12, 1897, leaving a will which was admitted to probate and letters testamentary issued to William Woodward Baldwin on June 23, 1897. The executor advertised for claims and on the 1st of September, 1898, the plaintiff filed a claim upon this promissory note with the executor without stating that an action was pending. Nothing further was done, the executor neither rejecting nor admitting the claim. On October 1, 1906, the executor filed his final accounts, from which it appears that the estate is largely insolvent; and in that account the executor has stated that he contests the right of this plaintiff to participate in the estate upon the ground that the note is barred by the Statute of Limitations. Whereupon the plaintiff made a motion to revive the action as against the executor. This motion was made on the 26th day of November, 1906, nearly ten years after the death of the testator and letters testamentary had been issued to his executor. That motion was granted and from the order granting it the executor appeals.

It seems to be settled that in an action at law there is no time fixed within which a motion to revive is barred, the time within which an action in equity can be revived being ten years. For some time it was considered doubtful whether or not the mere lapse of time justified the court in denying an application to revive an action at law, but that question was set at rest in *Pringle v. L. I. R. R. Co.* (157 N. Y. 100), where it was held that, although

there was no time fixed within which an application to revive must be made, the court was justified in denying the application where laches was shown. Since that time it has been generally recognized that waiting until the demand would be barred by the Statute of Limitations was such laches as, unexplained, justified a court in denying the motion to revive. In *Hale v. Shannon* (58 App. Div. 247) we held that a delay of between nine and ten years was such laches as required the court to deny the motion to revive. Here the cause of action is long outlawed, and the time within which an action can be brought upon this obligation, if it accrued at the time of the death of the testator, has long since expired. There is no excuse offered. The executor swears that since the death of the testator one of his sons has died; that the executor never heard of this action, and that the plaintiff filed his claim with the executor without mentioning the fact that an action had been brought to enforce it. If no action had been pending at the death of the testator the claim would have been outlawed. The mere fact that such an action was pending and that the defendant has neglected to prosecute it without any excuse for a period which would bar the claim under the statute if it accrued when letters were issued, required the court to refuse to revive the action.

I think, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to revive the action denied, with ten dollars costs.

PATTERSON, P. J., LAUGHLIN and LAMBERT, JJ., concurred;  
HOUGHTON, J., dissented.

HOUGHTON, J. (dissenting):

I think the order of revival was right and should be affirmed.

The laches of plaintiff is not inexcusable. Action had been brought on the note during the lifetime of testator, and judgment was not entered because of agreed payments which he made up to his decease. After the qualification of the executor the claim was presented to him in due course, and was retained by him without dispute as to its validity for years, and until he filed his accounts in the Surrogate's Court. The retention of the claim without rejection for such length of time naturally and properly led

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plaintiff to assume that there was no question of its genuineness. If it was admitted as a claim against the estate, as plaintiff had a right to assume it was, there was no occasion to revive the action and seek to obtain judgment, for no necessity existed therefor and no advantage or preference could be obtained thereby. By defendant's own act of retaining the claim without dispute, he led plaintiff to assume there was no occasion to revive the action and no laches on plaintiff's part can be predicated on the course it pursued.

The defendant does not pretend that any witness who could testify to the invalidity of the note has died, so that he has been deprived of his evidence by the delay. He says some persons have died but refrains from stating they could testify to any facts if they were alive. He also says he does not know of any facts on which to base a defense and does not know of any persons now alive who do. No more did his testator know of any defense, and he expressly recognized the validity of the note by making payments after the action was begun against him. The delay has not prejudiced defendant or deprived him of any testimony or defense he once had.

On the other hand, if it was true, as defendant asserts, that he now has the right to dispute the note and interpose the defense of the Statute of Limitations, the plaintiff will suffer irreparable injury. More than nine years have elapsed since the death of the testator, and more than eight years since the presentation of the claim. The plaintiff has no possible answer to the Statute of Limitations if it can now be interposed.

Personally, I do not think the law is or ought to be that an executor or administrator can retain a claim duly presented against his estate until the six-year Statute of Limitations has run and then reject it and plead the statute; but the defendant asserts that right, and on the assumption that such right exists it seems to me a very grave judicial error to deny to plaintiff the right to revive and prosecute its action to judgment.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

HARRY BROWN, on Behalf of Himself and All Parties Similarly Situated Who Shall Come in, Appellant, v. UTOPIA LAND COMPANY, Respondent, Impleaded with JOSEPH BERKOWITZ and Others, Defendants. . (No. 1.)

First Department, March 8, 1907.

**Injunction — reference to assess damage — must await final determination.**

A reference to determine the damages sustained by a defendant by reason of an injunction should not be granted until it is finally determined that the plaintiff is not entitled to the injunction.

An interlocutory judgment sustaining a demurrer to the complaint is not such final determination as justifies the court in granting an order of reference if the plaintiff has appealed from the judgment. In such case the right to assess damages is suspended until the determination of the appeal.

APPEAL by the plaintiff, Harry Brown, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of November, 1906, appointing a referee to determine the damages sustained by the defendant, the Utopia Land Company, by reason of an injunction, and directing that notice be given to the sureties named in the undertaking given on obtaining said injunction, and also from so much of an order entered in said clerk's office on the 21st day of December, 1906, as denies the plaintiff's motion to vacate said order of reference.

*A. H. Parkhurst*, for the appellant.

*Emanuel Jacobus*, for the respondent.

INGRAHAM, J.:

This action was commenced to require the individual defendants to account for their conduct as officers of the defendant Utopia Land Company, and to annul an annual meeting of the corporation. At the commencement of the action the plaintiff obtained an injunction restraining the defendants and each of them from all acts, including the annual election of officers or the removal of the present officers and directors from office, with an order to show cause why an injunction should not be continued during the pendency of the

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action. Upon the return of this order to show cause on February 15, 1906, the motion for an injunction was denied, without prejudice to the right to renew upon further papers; and the order to show cause was vacated and set aside. On May 29, 1906, the defendant corporation interposed a demurrer to the complaint, and the issue raised by this demurrer was heard by the Special Term on the 2d of October, 1906; and on October 16, 1906, the demurrer was sustained and judgment was entered thereon dismissing the complaint as to such corporation on the merits. The plaintiff was not given leave to amend the complaint, the interlocutory judgment reciting that it was entered on plaintiff's default. Whereupon the defendant corporation moved for an order of reference to ascertain the damages sustained by the defendant corporation by reason of the injunction which had been vacated. The plaintiff opposed the motion, claiming that it could not be granted until the final determination of the action. The motion was granted and a referee appointed. Subsequently the plaintiff made a motion for a reargument of that motion and to vacate the order appointing the referee upon additional papers submitted, the fact then appearing that the judgment of the Special Term sustaining the demurrer had been resettled so as to recite that both parties had been heard upon the issues of law raised by the demurrer and the demurrer had been sustained and that an appeal had been taken from the interlocutory judgment. This application for a reargument seems to have been granted, although no order was entered granting it, and the motion was thereupon reargued before the justice who had granted the original motion upon the new papers presented; whereupon he denied the motion for a reargument and denied the motion to vacate the order of reference; and the plaintiff appealed both from the original order of reference and from the order denying the motion to vacate the order of reference.

It seems to be settled that the undertaking cannot be enforced until the action is finally determined. In *Williams v. Montgomery* (148 N. Y. 519) the Court of Appeals reviewed the judgment appealed from in order to determine whether or not the plaintiff was entitled to the preliminary injunction at the time it was granted, so that the question as to the liability of the sureties upon the undertaking should not be foreclosed by the final judgment, which simply

dismissed the complaint upon the ground that the time within which equitable relief could be granted had expired, and that in consequence of such lapse of time the plaintiff's remedy was solely at law to recover damages. It is stated in the statement of facts that the preliminary injunction was vacated and the General Term had affirmed the order vacating it (68 Hun, 416); but it was held that the right to enforce the undertaking depended on the right of the plaintiff to equitable relief at the commencement of the action. In *Johnson v. Elwood* (82 N. Y. 362) it appeared that before the injunction was vacated or dissolved the defendant died. The injunction was subsequently dissolved by a stipulation upon the termination of another suit, and the action never was revived; that subsequent to the death of the defendant, on motion of his administratrix, the plaintiff was required to elect whether he would continue the action against her by a supplemental complaint. As the plaintiff did not elect to continue the action, it was on motion discontinued, without costs to either party, and a judgment of discontinuance was entered accordingly. It was held that there was no final decision that the plaintiff was not entitled to the injunction, and the order of reference could not be granted. In *Musgrave v. Sherwood* (76 N. Y. 194) the injunction was continued until the trial, when the complaint was dismissed; but from that judgment dismissing the complaint the plaintiff appealed. It was held that until the determination of the appeal there was no final decision that the plaintiff was not entitled to the injunction. In deciding that case the court said: "The decision of the Special Term, if allowed to stand, was a determination of the case. But when an appeal was perfected by the execution of the bond required by the Code, the final decision was postponed until that appeal was decided. In the meantime, the defendant has no claim to an order of reference to assess the damages." In *New York Security & Trust Co. v. Lipman* (83 Hun, 569) a temporary injunction had been previously granted, from which an appeal was taken by the defendants. The order granting the injunction was reversed\* and the reversal was sustained by the Court of Appeals. (*New York Security & Trust Co. v. Lipman*, 139 N. Y. 657). Subsequently a judgment in favor of the plaintiff, permanently enjoining the defendants from proceeding further

\* See *New York Security & Trust Co. v. Blydenstein* (70 Hun, 216). — [REp.]



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against the plaintiff, was entered. The effect of the order of the Special Term, vacating the temporary injunction affirmed by the Court of Appeals, was discussed, and it was held that as the judgment stood, finally determining that the plaintiff was entitled to an injunction, no liability on the undertaking could arise with such judgment standing in force and effect, because the condition of such undertaking was that the damages were not to be payable unless the court finally decided that the plaintiff was not entitled to the injunction.

From these cases it would appear that a referee to assess the defendant's damages should not be appointed until by the final judgment in the action it is determined that the plaintiff was not entitled to the injunction. The interlocutory judgment sustaining the demurrer to the complaint is not such a final determination as would justify the court in granting an order of reference. The motion as originally made being based, as it was, upon a final determination of the court sustaining the demurrer entered on default, the court was justified in granting the order, but when that judgment was resettled by stating that it was made after hearing counsel for the plaintiff as well as for the defendant, and the defendant had appealed from that judgment, the right of the court to proceed to assess the damages was suspended until the determination of the appeal, and the court should then have vacated the order of reference. This, of course, would be without prejudice to a renewal of the motion for a reference after the action had been finally determined.

If this is the correct view, then the original order which was appealed from should be affirmed, with ten dollars costs and disbursements to the respondent, but the order denying the motion to vacate the order of reference should be reversed, with ten dollars costs and disbursements to the appellant, and the order of reference vacated, with ten dollars costs.

PATTERSON, P. J., McLAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Original order affirmed, with ten dollars costs and disbursements; order denying motion to vacate order of reference reversed, with ten dollars costs and disbursements, and order vacated, with ten dollars costs. Order filed.

OTTO P. HEYN, Plaintiff, v. NEW YORK LIFE INSURANCE COMPANY,  
Defendant.

First Department, March 8, 1907.

**Principal and agent — when insurance agent not entitled to commissions  
on renewal premiums after discharge.**

In the absence of an agreement limiting an insurance agent's commissions to premiums received by the company during the continuance of his agency, he is entitled to commissions on renewal premiums received after the termination of his agency upon policies written during its continuance.

The parties, however, may agree to the contrary, and where a contract of agency for an indeterminate period provides for commissions on the original or renewal cash premiums collected "during his continuance as said agent," the agent is not entitled to commissions after the termination of his employment.

The above construction will be given to the contract although a subsequent clause provides, that, if in any year the agent secure new insurance on the plan stated aforesaid "subject to all the terms and conditions" thereof amounting to a certain sum, he shall be entitled to commissions upon the renewal premiums paid on such policies, etc. The two provisions should be read together and are not inconsistent.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Laurence Arnold Tanzer*, for the plaintiff.

*John Kirkland Clark*, for the defendant.

SCOTT, J.:

The matter in controversy between the parties comes before the court upon the submission of an agreed state of facts.

The plaintiff was an agent of the defendant under a contract dated September 15, 1896, which was for an indeterminate period and was terminated by the defendant on June 15, 1905. The question involved is as to plaintiff's right to receive commissions upon renewal premiums paid to and received by the defendant after the termination of the contract, upon policies secured by plaintiff while the contract was in existence. The rule generally applicable to such cases is well settled by authority, and is not questioned by either party to this controversy. It is that in the absence of any stipulation or agreement limiting the agent's commissions to premiums received by the company during the continuance of his agency, he is entitled to renewal premiums received after the termi-

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nation of his agency, upon policies written during its continuance. (*Hercules Mut. Life Assurance Society v. Brinker*, 77 N. Y. 435; *Hule v. Brooklyn Life Ins. Co.*, 46 Hun, 274; *affd.*, 120 N. Y. 294.) It is open to parties, of course, to make any agreement upon the subject they may see fit, and it becomes our duty to examine the contract between these parties to ascertain whether they have made any special agreement respecting renewal commissions which takes this case out of the operation of the general rule above stated.

The contract contains two clauses relating to the payment of commissions. The 20th clause, which is printed, reads as follows: "20th. It is agreed that said party of the second part (the plaintiff herein) shall be allowed under this agreement the following compensation only, unless otherwise expressly stipulated in writing, namely: a commission on the original *or renewal* cash premiums which shall *during his continuance as said agent* of said party of the first part (the defendant herein) be obtained, collected, paid to and received by said party of the first part up to and including the year of Assurance (*should his agency continue so long*) on policies of insurance effected with said party of the first part, by or through said party of the second part, which commission shall be at and after the following rates." Then follows a table showing the rate of original commissions to be paid on various claims or kinds of policies.

It is to be observed that this clause, while it evidently contemplates the payment of commissions upon renewal premiums, is careful to limit them to such premiums as shall be received by the company during the continuance of the plaintiff's agency. It does not, however, specify either the amount of the commission to be paid upon renewals, nor the number of years for which such commissions shall be paid. That omission is supplied by the 21st clause, which is typewritten and which originally applied only to the first year of plaintiff's agency, but was extended by agreement so as to apply to every year that the agency contract remained in force. It provides in substance that if in any year the party of the second part should secure new insurance on the plans designated in section 20, "subject to all the terms and conditions of said section," amounting to the sum of \$15,000, upon which the first cash premium was paid, the plaintiff should be entitled to a commission of five per cent upon such renewal premiums in such policies so written as should renew

for the second year of assurance, and for every additional \$15,000 procured as aforesaid said renewal should be extended to include an additional year of assurance.

The obvious meaning of this clause is that the number of years during which plaintiff was to be paid a commission on renewals was to be determined by the volume or amount of business influenced and procured by him. Standing by itself this clause would undoubtedly entitle the plaintiff to be paid a commission on renewals according to its terms, without regard to the termination or continuance of his agency. We do not think, however, that we are at liberty to so construe the contract, but that we must read clauses 20 and 21 together in order to arrive at the true intent of the parties. So reading them it is plain that the plaintiff was entitled to collect commissions only upon such renewal premiums as were paid to and received by the company during the continuance of the agency. Such is the clear and unmistakable language of section 20, and there is nothing in section 21 expressly to the contrary. In section 20 there is left a blank space with reference to the number of years during which commissions upon renewals were to be paid. If that blank had been filled up with any definite number it would have been too plain for argument that the right to receive commissions upon renewals was limited by the term of the agency. Section 21 in effect fills up that blank and imposes a further limitation upon the right to receive renewal commissions, in that the period during which they shall become due is limited by the amount of insurance written. We find nothing in clause 21 which contradicts or abrogates the specific provisions of clause 20 that whatever commissions plaintiff may be entitled to shall be limited to premiums received during the continuance of his agency and, therefore, following well-established rules of construction we must give full effect to both clauses.

It follows that there must be judgment for the defendant dismissing plaintiff's claim, with costs.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and LAMBEET, JJ., concurred.

Judgment ordered for defendant, with costs. Settle order on notice.

HUGO SCHUSTER, an Infant, by JOHANNA SCHUSTER, His Guardian ad Litem, Respondent, v. FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY, Appellant (Originally Impleaded with THE CITY OF NEW YORK).

First Department, March 8, 1907.

**Negligence — failure of railroad to repair pavement adjoining tracks — when liable for injuries caused thereby.**

A railroad is liable for injuries received by reason of its failure to repair the pavement between its tracks and for two feet in width outside its tracks as required by section 98 of the General Railroad Law, irrespective of whether any request or demand for such repair has been made by the local authorities. INGRAHAM and McLAUGHLIN, JJ., dissented, with opinion.

APPEAL by the defendant, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 31st day of May, 1906, upon the verdict of a jury for \$2,500, and also from an order entered in said clerk's office on the 27th day of May, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*E. Lóthard McClure*, for the respondent.

SCOTT, J.:

The only question necessary to be considered on this appeal is whether or not section 98 of the Railroad Law\* imposes a duty upon a street surface railroad company to keep in permanent repair the pavement between its tracks and two feet in width outside its tracks, irrespective of any request or demand on the part of the local authorities. The defendant's position is that no such duty is imposed unless and until the company is required by the local authorities to make repairs. The contrary appears to have been held in *Conway v. City of Rochester* (157 N. Y. 38) and *Doyle v.*

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\* Laws of 1890, chap. 565, as amd. by Laws of 1892, chap. 676.—[REp.]

*City of New York* (58 App. Div. 588). Upon the authority of these cases the judgment should be affirmed, with costs.

PATTERSON, P. J., and CLARKE, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

I do not concur in the affirmance of this judgment. The plaintiff, a boy eleven or twelve years of age, was on the 25th of April, 1900, playing in Forty-second street, between Eighth and Ninth avenues. Someone called that a policeman was coming, whereupon the plaintiff turned around to see where the policeman was. Seeing the policeman coming on the south side of the street, the plaintiff started to run and ran towards the east about three or four feet away from the rail. As he ran he turned his head to see where the policeman was and saw a car approaching about twenty or twenty-five feet away from him. While looking around he stepped in a depression in the pavement and pitched forward on the track and was run over by the car. He described the depression as about four or five feet wide along the car track, and about six or seven feet towards the curb. The road was paved with stone blocks, and this depression seems to have been at a place where the blocks had settled and was said to be about six inches in depth. There is considerable dispute as to the exact location of this depression, but I assume that there was evidence to show that some part of it at least was within two feet of the defendant's track, and there was evidence that the roadway had been in this condition for some weeks prior to the accident.

In his charge to the jury the learned trial judge, in stating the claim of the plaintiff, said: "He claims that these injuries which he received were caused through the carelessness and negligence of the defendant in operating this car and also in maintaining or continuing to maintain a hole near its track;" and then charged the jury that "the law imposes upon a railroad company the duty of keeping the space between its tracks and two feet on either side of the tracks in good and safe condition. If the hole was within the area I have described you will then consider whether or not negligence may be predicated upon it. The company, being charged with the duty of keeping the street in repair as I have described,

becomes negligent when it knows that it is out of repair, or it becomes liable in the absence of knowledge that the condition, which by the exercise of reasonable care it should have known to exist, has existed for such a length of time. It is for you to say whether there was a hole, and under the instruction I have given you, whether the defendant was negligent in maintaining it, if there was one." After the court had finished its charge and had passed upon the requests of the parties, the plaintiff asked the court to charge: "That the duty which was laid upon the railroad company to keep its tracks in a condition of permanent repair is an original duty, and that the railroad company cannot await the order of the local authorities before putting its railroad in a condition of permanent repair." That the court charged, and the defendant excepted. There was no evidence that this condition in the street had been caused in any way by the defendant's laying its tracks in the street, or that it had any connection with the track. The depression commenced within two feet of the track and extended some distance toward the curb. There was nothing to show that the plaintiff fell into the depression in the street within two feet of the defendant's track. The condition was that a depression existed in the roadway of the street which it was the duty of the city of New York to keep in repair, and that a very small portion of the depression was within two feet of the track, and that the plaintiff started to run east three or four feet from the track and fell into the depression. There was no duty of the defendant to do anything to the street outside of the space two feet from the track, and if the plaintiff started three or four feet from the track and ran east, it would seem that he fell more than two feet from the track into a depression for which the defendant was not responsible. The defendant was not liable because of an accident caused by a depression outside of the space that the defendant was bound to repair. I think that this instruction to the jury to which the defendant excepted was, therefore, error which required a reversal of the judgment.

Nor do I think that the defendant was bound to repair this pavement until required by the city authorities. We are not now considering a case where the track of a railroad company or any structure connected with the track caused the injury, but with a depression in the roadbed of the street, entirely outside of the track

and which had no relation to it, and was not caused by the construction of the track or the operation of the road. Upon this aspect of the case, it was the fall of the plaintiff caused by stepping into a depression in the roadway that caused the injury, and in discussing the question we can eliminate the fact that the car ran over him. The question presented is whether this defendant was liable in an action based upon negligence for a failure to repair this depression in the roadway. The basis of this liability is section 98 of the Railroad Law (Laws of 1890, chap. 565, as amd. by Laws of 1892, chap. 676). That section provides: "Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days notice to do so, the local authorities may make the same at the expense of such corporation." A municipal corporation is primarily charged with the duty to keep the streets or avenues in repair so that they may be reasonably safe for the use of the public, and it was the duty of the city of New York to keep this street in repair. In relation to this duty imposed upon municipal corporations, the Legislature has also imposed upon street surface railroads using the surface of the streets an obligation to keep in permanent repair the portion of such street, avenue or public place, between its tracks, the rails of its tracks, and two feet in width outside of its tracks; but that duty is to be performed under the "supervision of the proper local authorities and whenever required by them to do so." The question presented relates to the duty imposed upon the railroad company under this section of the Railroad Law. The railroad company having placed its tracks upon the surface of the street, and the street having been paved, regulated and graded, it would be the duty of the city to repair any depression or hole in the pavement outside of the tracks, but for this provision of the statute. Before the railroad company or any other person could remove this pavement or do any work in relation to it, the consent



of the city of New York must be obtained. Section 525 of the New York charter (Laws of 1897, chap. 378), which was in force at the time of the accident, provided that "no removal of the pavement or disturbance of the surface of any street \* \* \* for any purpose whatever, shall be made until a permit is first had from the department of highways." This provision has since been revised in section 391 of the charter of said city of New York (Laws of 1901, chap. 466) so as to provide that "no removal of the pavement or disturbance of the surface of any street \* \* \* for any purpose whatever, shall be made until a permit is first had from the president of the borough where the work is to be done." The statute, therefore, required the railroad company to keep in permanent repair the portion of Forty-second street between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, whenever required by them to do so, but without power to touch the pavement or to do any work in relation thereto until a permit was first had and obtained from the department of highways, or at present, until a permit is first had and obtained from the president of the borough within which the street is located. This obligation to repair this street, as I read the statute, did not arise until the local authorities required the defendant to make repairs, for, until they were so required it was impossible for the railroad company to know the manner in which the repairs were to be made. If the railroad company had attempted to remove this pavement for the purpose of making it level, without a permit from the borough president, it would have been liable to a penalty, and the very statute which imposes the obligation seems to limit the obligation to make the repairs or the time within which they were to be made to a requirement of the local authorities that the repairs be made, prescribing the manner in which they shall be made. Primarily the statute is passed to protect the city and to relieve it of an obligation imposed upon it to keep the street in repair. The statute does not in any express terms make the railroad company liable for any accident that happens to third parties in consequence of a failure of either the city or the railroad company to properly repair the streets, but imposes upon the railroad company using a street an obligation to relieve the city from the expense of keeping the street in repair for a space within

its tracks and within two feet of the tracks on either side. Certainly, as between the railroad company and the city, there was no duty imposed upon the railroad company to take up this pavement and restore it to its proper condition until the city had required the railroad company to make the repairs, for, by the express provision of the statute, the railroad company was to have thirty days after the notice had been given to make the repairs and charge the company with the amount expended therefor.

Thus the duty, it seems to me, that was imposed upon the railroad company was to make the repairs when required to do so by the city, and until the city required them to make such repairs, the railroad company was guilty of no default and was not liable, either to the city or to a third party, for an accident caused by a street being out of repair. This view of the statute is, I think, sustained by the case of *Conway v. City of Rochester* (157 N. Y. 33). That was a question between a property owner and the city of Rochester as to the right of the city to make a contract for paving a street through which a line of street railroad was operated. Two questions were certified to the Court of Appeals. The first was: "Are the abutting owners on Lyell Avenue liable for the cost of constructing a new pavement between the tracks and the rails of the tracks, and for two feet in width outside of the tracks of the Rochester Railway Company?" *Second*. "Is the duty of the Common Council of the City of Rochester to request the Rochester Railway Company to construct a pavement between its tracks, and the rails of its tracks, and for two feet outside thereof on Lyell avenue, before the city constructs such pavement, mandatory?" After quoting section 98 of the Railroad Law, to which attention has been called, the court said that the statute was mandatory as to the duty of the railroad company using the street to keep such portion of the street in permanent repair; that the municipal authorities were given no authority to relieve the railroad corporation of the whole or any portion of the needed repairs, or to impose the whole or any portion of the cost upon the abutting owners or the city at large; that "having provided that a given portion of a street occupied by a street surface railroad corporation shall be kept in permanent repair, and that the work shall be done by the corporation in actual occupation of the tracks, the statute

next undertakes to provide a method by which the duty enjoined by the statute can be enforced in such a manner as will best protect the interests of the public in such streets, and so it declares that when such repairs are made they shall be made 'under the supervision of the proper local authorities.' But the power of the local authorities does not end with the right of supervision of the repairs made to such portion of a street by a surface railroad corporation. The Legislature saw fit to vest in the local authorities the further right to determine when the repairs should be made and how they should be made. \* \* \* The local authorities may determine when and how the street shall be repaired, but when that is done the statute steps in and says the railroad company is to do the work. \* \* \* Our examination of the statute then leads to the conclusion that under section 98 of the Railroad Act it became and was the duty of the Rochester Railway Company to keep in permanent repair such portion of the street through which it passed, as was within its tracks, and two feet in width outside, and that the local authorities of that city were vested with the authority of determining when the repairs should be made, and thus empowered, the local authorities did determine that repairs should be made and the character of them. They decided that the entire street should be repaved and that the material to be used should be asphalt. This they had the right to do, and when this determination was made the statute intervened and commanded that the Rochester Railway Company should make the repairs thus ordered, under the supervision of the local authorities."

This seems to me to be a plain declaration that the duty resting upon the railroad company did not arise until the municipal authorities determined what repairs were necessary and when they should be made, and that, in this case, as no determination had been made, neither as to the nature of the repairs nor as to the time when they should be made, no duty was imposed upon the railroad company to make the repairs; and the fact of the existence of this depression, even though it was within two feet of the railroad, was not a failure by the railroad company to perform any duty imposed upon it by law, and, therefore, could not be the basis of a recovery by the plaintiff. That the municipal corporation should have control over the time when and the manner in which the public streets are to be

repaired or the pavement torn up seems to me essential to the proper maintenance of the streets. It may well be that the local authorities would consider that this street should not be torn up at this time because of the use of the street, but that it should be repaired when the obstruction to the street would cause less inconvenience to the public. This the statute left to the discretion of the local authorities, both as to the time when and the manner in which the repairs should be made. Unless the railroad company was under the absolute duty to at once repair the pavement as soon as it became in any way out of repair, without any permit from or requirement of the municipal authorities, then it seems to me that there can be no liability for a failure to make the repairs; and as the statute only imposes the duty to make the repairs upon the railroad company when required by the municipal authorities, the duty did not arise until the railroad company was required to make the repairs, and there was, therefore, no violation of duty by the defendant.

The case of *Doyle v. City of New York* (58 App. Div. 588) is also relied upon by the plaintiff. In that case the court was construing the charter of the Brooklyn City Railroad Company, under which the railroad that caused the injury was operated. The provisions of that charter are materially different from the provisions of section 98 of the Railroad Law, and imposes a much broader obligation upon the corporation. In the course of the opinion in that case the court refers to section 98 of the Railroad Law, and there are some expressions in the opinion which would seem to indicate that the defendant was liable without any action by the city authorities, but what was said in relation to the Railroad Law was not necessary to a decision of the case, as the liability could have been and was placed upon the provision of the charter of the railroad company; but it seems to me that the views of the Court of Appeals, as expressed in *Conway v. City of Rochester* are inconsistent with the intimation of the court in the *Doyle* case.

I think, therefore, the judgment should be reversed.

McLAUGHLIN, J., concurred.

Judgment and order affirmed, with costs. Order filed.

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ALBERT LILIENTHAL and PHILIP N. LILIENTHAL, Appellants, v.  
THE GEORGE BECHTEL BREWING COMPANY, Respondent.

First Department, March 8, 1907.

**Sale — pleading — threat to pursue legal remedy not duress.**

In an action for the breach by the vendee of a contract for the sale of hops, the answer as a counterclaim alleged that the defendant was in great business distress by reason of the maturity of notes held by the plaintiff, which it was unable to meet and that the plaintiff threatened suit thereon unless the defendant would cancel portions of the contract of sale and resell the goods to the vendor at an inadequate price; that the defendant was compelled by said duress to accede to the demands of the plaintiff, and gave it a note for \$800 without consideration, which note though paid at maturity was extorted by duress.

*Held*, that, conceding that the counterclaim waived the tort and stated a demand for money had and received, it was subject to demurrer for the plaintiff was only following a legal right. A threat to pursue a legal remedy to which a party is entitled is not duress;

That, in any event, the defendant by paying the note had waived the duress.

APPEAL by the plaintiffs, Albert Lilienthal and another, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 3d day of December, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the plaintiffs' demurrer to the counterclaim set forth in the defendant's answer.

*Charles W. Coleman*, for the appellants.

*William D. Gaillard*, for the respondent.

SCOTT, J.:

The complaint alleges that a contract was entered into on March 4, 1904, for sale and delivery by plaintiffs to defendant of a quantity of hops, of which a part was to be delivered and received during the season commencing in December, 1905, and a part during the season commencing December, 1906; that defendant has repudiated the contract and refused to accept the hops deliverable in the

season beginning in December, 1905. The purpose of the action is to recover damages for the breach.

The defendant sets up a counterclaim, the plaintiffs' demurrer to which has been overruled.

The counterclaim alleges that after making the contract set up in the complaint, and in October, 1904, the defendant was in great business distress by reason of the maturity of two notes held by plaintiffs which had fallen due on September fifteenth and October twelfth respectively, and which defendant was unable to meet; that plaintiffs threatened that they would bring suit on the said matured notes and put the same in judgment unless defendant would cancel a part of the contract of March 4, 1904, and would sell back to plaintiffs at a reduced price another contract made in January, 1904; that at the time the hops covered by the last-mentioned contract were worth much more than the contract price, and plaintiffs should have paid defendant a considerable sum for the cancellation of that contract, instead of exacting a payment from it; that the plaintiffs knew the extreme necessity under which defendant was, and that if defendant permitted the said notes to be put in suit and judgment taken thereon, it would result in the collapse and ruin of the business of defendant; that owing to its business necessities defendant was compelled to accede to the demands of plaintiffs, and made the cancellation required and gave to plaintiffs its note for \$800 payable eight months after date, without interest; that said note was paid at or after its maturity, and that no consideration therefor passed from plaintiffs to defendant, but said note was extorted by plaintiffs from defendant through duress and by reason of the imminent danger in which defendant's business was at that time, all of which was well known to plaintiffs; that the matured notes aforesaid which were extended by plaintiffs were thereafter duly paid; that for the reasons aforesaid the plaintiffs on or about June 14, 1905, received the sum of \$800 from defendant without consideration moving to defendant, and judgment is asked for that sum.

In the court below the counterclaim seems to have been treated as one sounding in tort, allowable, however, because it arose out of the same transaction set forth in the complaint. It is clear that the cause of action, if there be one stated in the counterclaim, did not

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arise out of the contract of March 4, 1904, for the sale of hops, but out of a transaction alleged to have taken place subsequently, to wit, in October, 1904, and in this aspect the counterclaim is not one of those authorized by the Code of Civil Procedure. The defendant insists, however, that it had counterclaimed for money had and received, waiving the tort, and it is only in this aspect that the pleading can be seriously considered. Even thus considered, however, the counterclaim is insufficient. It alleges that the defendant, being unable to meet certain obligations at maturity, sought an extension from plaintiffs which the plaintiffs were unwilling to give except upon the terms set forth. In taking this attitude the plaintiffs were clearly within their legal rights. They were asked to extend a favor to defendant which they were at liberty to grant or refuse, and if they granted it they were entitled to attach conditions and exact consideration for the favor. What it is said they threatened to do was no more than to pursue a legal remedy to which they were entitled, and this does not constitute duress. (*Martin v. New Rochelle Water Co.*, 11 App. Div. 177; *affd.*, 162 N. Y. 599; *Dunham v. Griswold*, 100 id. 224; *Secor v. Clark*, 117 id. 350.)

Defendant relies upon *Van Dyke v. Wood* (60 App. Div. 208) which differs so completely as to its facts from the present case that it is not applicable at all. In that case not only was there a duress of property, but the thing which the defendant refused to do without further compensation she had already been fully compensated for and had expressly promised to do. As the court was careful to point out, the plaintiff's assignor in that case was not in the position of one who comes to ask of another a favor which the other may or may not grant at his will. That, however, was the precise position of this defendant when it sought an extension of its over-due obligation. Finally, even if defendant had shown duress, it has effectually waived it. The rule is that when a contract is sought to be avoided as having been procured by duress the party claiming to have been wronged must proceed promptly. If he remains silent, keeps the property received or recognizes the contract by making payments thereon he will be held to have waived the duress. (*Buck v. Houghtaling*, 110 App. Div. 57.) In the present case if any duress could be said to be alleged it was with reference to the

making of the \$800 note, not with regard to its payment some months later. That payment waived the duress.

The judgment must be reversed, with costs and disbursements, and the demurrer sustained, with costs, with leave to defendant to amend the answer upon payment of said costs.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend on payment of costs in this court and in the court below. Order filed.

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JAMES M. ELLIOTT, JR., Respondent, v. JAMES B. BRADY and Others, Appellants.

First Department, March 8, 1907.

**Contract — only parties to sealed instrument can sue — principal and agent.**

When a contract is under seal only parties to the contract can sue upon it.

Hence, when defendants are sued upon promissory notes indorsed by them and given in payment of a contract under seal for the purchase of stock executed by their agent, a defense that the sale was procured by fraud and misrepresentation is not available when the agent is not a party to the action.

Principals who are sued as indorsers on a promissory note given in payment of a contract under seal executed by their agent, cannot avoid the force of the rule aforesaid by claiming that being sued as indorsers they may defend by showing that they became such by fraud which induced the execution of the sealed contract.

APPEAL by the defendants, James B. Brady and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of January, 1906, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term.

*Edward W. Hatch* [*Charles J. Hardy* with him on the brief], for the appellants.

*H. Aaron*, for the respondent.



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SCOTT, J. :

This action is brought upon four promissory notes, aggregating \$125,000, made by the Industrial Securities Company and indorsed by defendants.

It appears from the evidence that in the year 1902 the defendants purchased from plaintiff a controlling amount of the common and preferred stock of Southern Car and Foundry Company for upwards of \$600,000. By arrangement between the parties, and apparently for the convenience of defendants, the actual contract of sale was made between plaintiff and one Martin Paine, who represented and acted for defendants, and who had no personal interest in the transaction or in the stock thus purchased by him. The contract of sale was dated October 21, 1902, was under seal, and was signed by plaintiff and Paine. The contract was within a few days fully carried out and the stock delivered and paid for. As part of the consideration, plaintiff then received promissory notes, indorsed by these defendants, for \$259,900, which are the predecessors of the notes now sued upon, the original notes having been partly paid off and renewed from time to time as to the unpaid balance. The defense relied upon is that, as an inducement to defendants to enter upon an agreement for the purchase of the stock, plaintiff made certain false representations as to the value thereof, and suppressed certain material facts, and that defendants, relying upon said false statements and being in ignorance of the suppressed facts, were induced to purchase the said stock and to indorse the notes. At the trial, after formal proof of the notes, the defendants undertook to prove the allegations of their answer, and, for the purposes of this appeal, it may be assumed that they proved certain misrepresentations. At the close of defendants' case the court directed a verdict for plaintiff, and the appeal is from a judgment entered on that verdict.

The defense amounts to an attempt on the part of the defendants to avoid the payment of the consideration for the contract between the plaintiff and Paine by showing that they were induced to cause that contract to be entered into, and to become responsible for the consideration thereof, by the plaintiff's fraud. In our opinion this defense cannot prevail. It is well settled and is not disputed that,

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since the agreement was under seal, only Paine, the party to it, could sue upon it, and it is equally well settled that Paine alone can sue to recover damages for the alleged fraud in its inducement (*Denike v. De Graaf*, 87 Hun, 61), and the fact that Paine was merely an agent, and that defendants were the real parties in interest does not entitle the latter to sue. It follows that defendants cannot offset against their promise to pay the contract price, the damages resulting from plaintiff's fraud in inducing the contract to be made. (*Gillespie v. Torrance*, 25 N. Y. 306; *Lasher v. Williamson*, 55 id. 619.)

The defendants seek to avoid the force of this rule by distinguishing between the contract of purchase, and their contract of indorsement, claiming that as they are sued as indorsers they may defend by showing that they were induced to become indorsers by fraud. This attempted distinction between the contract of purchase and the agreement to pay the consideration for the purchase cannot avail the defendants. The notes are merely the evidence of the defendants' promise to pay the consideration named in the sealed contract. To attempt to offset against the consideration damages arising from the alleged fraud in inducing the purchase cannot be permitted to one not a party to the sealed instrument. (*Denike v. De Graaf, supra.*)

The judgment should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment affirmed, with costs. Order filed.

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ALVIN PETERSON, an Infant, by IDA PETERSON, His Guardian ad Litem, Respondent, v. INTERURBAN STREET RAILWAY COMPANY, Appellant.

First Department, March 8, 1907.

**Negligence — child injured by street car — failure to look — erroneous charge.**

In an action for injuries received by a child who, while crossing the street, was struck by a car, there was no evidence that he looked in either direction and it appeared that the car was moving slowly. On the question of failure to look the court charged in substance that there is "no hard and fast rule that

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requires a person to look up and down the track when about to cross the track of a street surface railroad. If the car at the time a person undertakes to cross is sufficiently far away that a person in the exercise of ordinary care may get across in safety then the failure to look is not evidence of negligence. In a crowded city like this if every person waited for a car to stop and slow up before they got across the street, they would be a good while in getting across."

*Held*, that, considering the facts, the charge was error and required a reversal.

APPEAL by the defendant, the Interurban Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of April, 1906, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 24th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*Henry S. Dottenheim*, for the respondent.

SCOTT, J.:

Appeal from judgment for personal injuries.

Plaintiff at the time of the accident was about six and one-half years old, and was normally bright for his age and accustomed to go into the street unattended. It was conceded that he "was of sufficient age and intelligence and discretion to appreciate to some extent the necessity for caution and the necessity for exercising some judgment and discretion."

The accident occurred in the middle of the block, or at least some distance from the crosswalk, at six o'clock in the afternoon of an August day, and consequently in daylight. The car was running very slowly and the boy was crossing the street diagonally so that his back was partly toward the car. When the boy walked upon the track the car was very close to him, certainly not more than fifteen feet, and some of the witnesses say not more than eight or ten.

There was no evidence that the plaintiff exercised the slightest care, or ever looked in the direction from which the car was coming before he essayed to cross the track. If he had, in view of the concurrent testimony as to the proximity of the car, it would have

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amounted to heedless negligence to have attempted to cross in front of it, and the complaint might well have been dismissed for lack of proof of plaintiff's freedom from negligence. But if the court concluded to send the case to the jury the circumstances called for most careful instructions relative to plaintiff's duty to exercise proper care. The main or colloquial charge was unexceptionable, and when asked by defendant to charge that, in finding whether the boy exercised reasonable care for his own safety, the jury might consider the fact that there was no evidence that he looked for the car before going upon the track, the court did so but supplemented this instruction by saying: "I should add in explanation of that instruction that there is no hard and fast rule of law that requires a person to look up and down the track when about to cross the track of a street surface railroad. If the car, at the time a person undertakes to cross, is sufficiently far away that a person in the exercise of ordinary care may get across in safety, then the failure to look is not evidence of negligence. In a crowded city like this, if every person waited for a car to stop and slow up before they got across the street, they would be a good while in getting across, but it is proper that you should bear in mind all the evidence."

This modification of or supplement to defendant's request was duly excepted to, and, as we consider, calls for a reversal of the judgment. We are not prepared to hold that, even considered as an abstract proposition of law, the instruction was accurate. It is undoubtedly the duty of a person attempting to cross a railway track, whether in the city or the country, to exercise care to ascertain whether it is safe to make the attempt, and the failure to look for an approaching train or car must be considered as some evidence of negligence. Of course it is not conclusive. It may well be that at the time the foot passenger should have looked the car was so far away that, even if he had looked, it would not have been imprudent to attempt to cross. In such a case the jury may consider that the failure to look was not the proximate cause of the accident, and this is undoubtedly what the learned court intended the jury to understand. But whatever may be said as to the correctness of the abstract proposition it was strikingly inappropriate to the facts shown by the evidence in this particular case, and its tendency was to lead the jury to believe that it was unimportant

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whether or not the plaintiff did, in fact, look for the car before going on the track.

The judgment and order must be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

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PERRY ALLEN, Appellant, v. HENRY J. O'BRYAN, Respondent.

First Department, March 8, 1907.

**Principal and agent — moneys advanced in connection with securing concessions from foreign government — burden on agent to show what he has done with principal's money.**

It is not unlawful or immoral for a principal to advance moneys to an agent employed to secure mining concessions from a foreign government to pay the expenses of the foreign governor to the capital to interview the President of the country and to pay for publishing concessions reported by the agent to have been granted. The principal may recover from the agent moneys advanced for that specific purpose on the failure of the agent so to apply them. In an equitable action of accounting the burden is upon the agent to show that he has performed his duties and how he has expended his principal's money advanced for the specific purpose.

APPEAL by the plaintiff, Perry Allen, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of August, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

*Maxwell C. Katz*, for the appellant.

*Henry J. O'Bryan*, for the respondent.

SCOTT, J. :

The parties to this action are both attorneys. The defendant in 1904 was about to visit the State of Panama, and was employed by

plaintiff to obtain, if possible, from the authorities of that State certain concessions relating to mineral properties. A contract was drawn between the parties whereby defendant agreed to use his best efforts in that regard, and plaintiff agreed to compensate defendant by giving him twenty per cent of whatever he (plaintiff) might receive upon the sale of the concessions so to be obtained.

It was expressly agreed that plaintiff was not to be liable for any traveling or other expenses nor for any disbursements to be made by defendant, unless first expressly authorized in writing or by cable.

It is claimed that this is not a valid or enforceable agreement, but that question does not seem to us to be important, as this action is not based upon the agreement.

Just before leaving for Panama defendant informed plaintiff that the President of that country made it a rule not to grant a concession respecting an outlying province without having first personally consulted the governor of the province, and that it would be well if he, defendant, were to be furnished with sufficient funds to enable him to offer to pay the expenses of a trip by the governor of the province in which the concessions were to be sought, from said province to the capital, and thereupon plaintiff gave to defendant the sum of \$200 to be used for this specific purpose. We are unable to see that the purpose for which it was proposed to use this money was unlawful or immoral. Later, defendant cabled plaintiff as follows: "Concession granted by President. It should be published. Must pay immediately \$310. Send money by telegraph instead of by mail." Plaintiff testified, and we see no reason to doubt him, that he believed that the sum asked for was necessary for publication in the official journal, stamp taxes and notarial fees, and he at once cabled the money.

Defendant had obtained no concessions, did not expend any money to bring the governor of the province to the capital, and, so far as it appears, never paid out any of the plaintiff's money for the purpose for which it was paid him, although he vaguely and mysteriously hints that he has expended all he received, and more, in some way which he refuses to disclose.

The plaintiff sues for an accounting, and his complaint was dismissed.

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In *Marvin v. Brooks* (94 N. Y. 71) the Court of Appeals held: "Where an agent has been entrusted with his principal's money to be expended for a specific purpose, the former may be required to account in equity; and upon such an accounting the burden is upon him of showing that his trust duties have been performed and the manner of their performance." This rule is applicable to the present case. The moneys were given to defendant for specific purposes, not illegal, and he should be required to show how he expended them.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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HERTS BROTHERS, Respondent, v. LOUIS C. TIFFANY and Others, as Executors of and Trustees under the Last Will and Testament of CHARLES L. TIFFANY, Deceased, Appellants, Impleaded with BURNETT Y. TIFFANY and EDWARD S. HOSMER, as Trustee in Bankruptcy of BURNETT Y. TIFFANY, Defendants.

First Department, March 8, 1907.

**Debtor and creditor — judgment creditor's action to reach trust fund — when complaint states cause of action.**

In a judgment creditor's action against trustees holding property for the debtor it was alleged that under the will the trustees were empowered in their discretion to pay the debtor such sum as was necessary for his support; that the sum allowed by the trustees was excessive, and that the balance of the debtor's income was applicable to the judgment; that there had already accrued from such surplus income a large amount of money remaining in the trustees' hands not paid to the debtor, and that the trustees have received and now retain moneys in trust for the use of the debtor applicable to the payment of his debts.

*Held*, that the complaint stated a good cause of action;

That as the answer did not allege that the whole of the amount set apart for the support of the debtor had been paid, and that no part of it remained in the possession of the trustees, it was subject to demurrer.

INGRAHAM, J., dissented, with opinion.

APPEAL by the defendants, Louis C. Tiffany and others, as executors and trustees, etc., from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of December, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the plaintiff's demurrer to the first separate defense contained in the amended answer of the said defendants.

*Arthur F. Gotthold*, for the appellants.

*L. M. Berkeley*, for the respondent.

LAMBERT, J. :

The complaint in this action alleges the recovery of a judgment by plaintiff against Burnett Y. Tiffany for necessities furnished by it with the consent of defendant trustees and the return of execution unsatisfied; the bankruptcy of Burnett Y. Tiffany, and the appointment of the defendant Hosmer as trustee; the death of Charles L. Tiffany, the probating of his will and the appointment and qualification of defendants as trustees thereunder; the giving by said will to said trustees of certain property, the income from which was to be applied in their discretion to the use of Burnett Y. Tiffany, and that they have been and now are paying the latter \$18,000 annually, the amount fixed by them in their discretion as proper for his support; that such sum exceeds the amount necessary for Burnett Y. Tiffany's proper support, and that the sum of \$3,000 is sufficient therefor, "and the remainder of the said annual income of \$18,000 is surplus income, properly applicable to the payment of the debts of the defendant Burnett Y. Tiffany; \* \* \* that there has already accrued of said surplus income" a large amount of money remaining in the trustees' hands and not paid over to Burnett Y. Tiffany; and that the trustees have received and now retain moneys in trust for the use of Burnett Y. Tiffany applicable to the payment of his debts. The relief asked is (1) for an accounting by the trustees of moneys received in which Burnett Y. Tiffany has an interest; (2) that such portion of the \$18,000 in excess of the amount determined by the court to be necessary for his support be applied to the payment of plaintiff's judgment; (3) that the trustees be



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enjoined from paying over such excess; (4) that a receiver be appointed, and (5) for further relief.

The "first and separate defense" of the answer here demurred to sets forth the death of Charles L. Tiffany leaving a will, which is annexed to and made a part of the allegation; the probate of the same and the appointment and qualification of defendants as trustees; that pursuant to said will and codicil, in the exercise of their discretion, the trustees fixed upon the sum of \$18,000 as the proper amount to be paid Burnett Y. Tiffany annually, and the payment of the balance of the income of the trust property to certain other persons according to the directions of the will and codicil. The will and codicil referred to gives the trustees discretion to pay to Burnett Y. Tiffany such portion of the income as they deem necessary for his proper support.

The judgment creditor seeks to reach a surplus income in excess of the amount necessary for the support of Burnett Y. Tiffany. If the latter, under the will and codicil, was to receive the whole income of the trust estate, there is no question but that plaintiff's judgment could be satisfied out of such surplus, were any shown to exist. (*Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 id. 616.) Following the reasoning adopted in *Matter of Hoyt* (116 App. Div. 217), it is evident that the income from the trust estate came into the hands of the trustees for the benefit of Burnett Y. Tiffany primarily, and could be transferred to him, if in the opinion of the trustees the entire income was necessary for his proper maintenance. If, however, they deemed that a portion only should be used for this purpose, his right to the excess over such portion was liable to be divested, and the amount remaining to be paid to certain other persons. Here we have an allegation that there are certain moneys in the trustees' hands belonging to Burnett Y. Tiffany, and not necessary for his support, out of which a judgment for necessities, furnished him with the knowledge and consent of the trustees, should be satisfied. The facts alleged state, in my opinion, a good cause of action.

The defense demurred to, that the trustees have fixed upon a certain sum as the proper amount to be paid Tiffany, and have turned over the balance to the persons entitled thereto, appears to me to constitute no defense to such a cause of action. The

defense does not allege that the whole \$18,000 has been paid Tiffany as fast as it accumulated, and that no part thereof remains in their possession which would disclose a complete disposition of the trust income; nor can such an allegation be read into the portion of the complaint which shows that the trustees have been and now are paying Tiffany this amount. On the contrary, the latter allegation implies that the income is gradually accumulated, and affirmatively shows its disposition at intervals. A portion of whatever income, if any, shown to be held by the trustees, may or may not be surplus, and is a matter to be determined upon the trial of the action.

For these reasons the interlocutory judgment sustaining the demurrer should be affirmed, with costs, with leave to the defendants to amend their answer within twenty days.

PATTERSON, P. J., LAUGHLIN and HOUGHTON, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I think this judgment should be reversed. The complaint alleges that on or about February 18, 1902, one Charles L. Tiffany died, leaving a last will and testament which was duly admitted to probate by the surrogate of New York county; that in and by said will the defendants were appointed executors of and trustees under the said will and letters testamentary were issued to them; that in and by said will a large amount of property was given to said executors and trustees in trust to invest the same and to collect the income thereof, and to apply such part of the same as in their discretion they should from time to time deem proper, to the use of the defendant Burnett Y. Tiffany for and during his natural life; that pursuant to said provisions of said will, the said executors and trustees have heretofore fixed the sum of \$18,000 a year, or \$1,500 a month, as the proper amount to be paid to the defendant Burnett Y. Tiffany, and for a long time they have been paying him and are now paying him the sum of \$1,500 a month in equal quarterly payments every month.

The defense demurred to alleges the death of Charles L. Tiffany, the making of his will and codicil thereto, copies of which are annexed to the answer as a part of the defense. It is then alleged

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that the defendants, in the exercise of their discretion, fixed upon the sum of \$18,000 per annum, payable in equal monthly installments of \$1,500, as a proper amount at that time to pay to the said Burnett Y. Tiffany; that pursuant to the directions of the testator in said will and codicil contained, these defendants have from time to time paid the balance of the income from the property held in trust, as directed by said will and codicil, to Annie O. Mitchell and Louis C. Tiffany, the persons named therein.

It appears from the codicil to the will that the testator gave to his executors in trust certain property to invest the same and to collect the net income thereof, and to apply such part of the same as in their discretion "they shall from time to time deem fit and proper, which discretion shall not be in any manner interfered with by any court, to the use of my son Burnett for and during his natural life and to apply the balance of said net income during the life of my son Burnett to the use of my son Louis C. Tiffany and my daughter Annie O. Mitchell," with a bequest over, and with the following clause: "And in my opinion, which, however, is not to control the discretion of my executors unless a radical change shall take place in his life and habits the sum of Three thousand (3,000) dollars per annum payable in monthly installments will be an ample amount for his proper support and maintenance." The complaint did not set out a copy of the will, but only an abstract of its contents. The defendants, by this separate defense, set forth the will and codicil in full, and if, from the provisions of the will and codicil, it appears that this action cannot be sustained, then the defense is good. The will does not authorize the trustees to determine that a specific amount of income should be payable to Burnett Y. Tiffany, which amount would then become payable to him, but directs them to apply such part of the income as in their discretion they shall, from time to time, deem fit and proper, which discretion shall not in any manner be interfered with by any court, with a provision that the balance of the income from the trust fund which should not be applied by the trustees to the use of his son Burnett should be paid to another son and a daughter. It seems to me that the effect of this provision is that all the income from the trust estate, not actually applied by the trustees to the use of Burnett, becomes at once the property of his other son and daughter, and that the trustees are

bound to pay to them such unapplied income. The testator considered that the sum of \$3,000 per annum would be sufficient for the proper support and maintenance of his son, but this was advisory merely, and this provision was not to control the discretion of the trustees; but it seems to me that there could be no accumulation of income to which either the son Burnett or his creditors would be entitled under this clause of the will. If the trustees failed to apply any portion of the income, whether they had determined that a certain amount of income should be paid to Burnett or not, the amount that they failed to apply for his support and maintenance became at once the property of his brother and sister, and neither Burnett nor his creditors could compel the trustees to pay it to him or them. This trust property and the income is not, and never was, the property of Burnett Y. Tiffany, and neither to the principal nor the income has he acquired any right or title. There was nothing, therefore, that his creditors could reach by a creditor's bill. The testator had a right to do what he pleased with his own property. He had a right to limit the interest of a legatee or beneficiary in the property, and, having such absolute power of disposition, he left property in trust, with a discretion to his trustees to apply a portion of the income to the support of his son, and that the balance of the income of the trust property not so applied should be paid to the others named. The persons who were entitled to the balance of the income acquired a vested right in the income not used for the support and maintenance of the son, and the court cannot, as I view it, interfere with their vested right to such income in favor of either the son or his creditors.

I think, therefore, that this was a good defense to the action, and that the demurrer to it should be overruled.

Judgment affirmed, with costs, with leave to defendants to amend on payment of costs in this court and in the court below.

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DANIEL McNAMARA, Respondent, v. S. ORMOND GOLDAN, Appellant.

First Department, March 8, 1907.

**Libel—letter charging plaintiff with sending obscene letters—when complaint fails to state cause of action.**

The complaint in an action for libel must state more than conclusions of fact; facts themselves must be alleged from which the conclusions may be drawn. Hence, in an action for libel in writing a letter which charged the plaintiff with writing letters which, by innuendo, are said to be obscene, the complaint is subject to demurrer, as the characterization of the letters is a mere conclusion. The contents of the letters alleged to be obscene should be set forth.

APPEAL by the defendant, S. Ormond Goldan, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of November, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint in an action to recover damages for an alleged libel.

*Levin L. Brown*, for the appellant.

*Joseph N. Tuttle*, for the respondent.

LAMBERT, J.:

The complaint alleges that the defendant "falsely, wickedly and maliciously" composed and published, and caused and procured to be published of and concerning this plaintiff, the following letter:

"NEW YORK, Sept. 12, 1905.

"The Rev. Father JOHN COLLINS,

"Fordham, St. John's College,

"New York City:

"MY DEAR SIR.—When with Mr. Macnamara I last saw you, you informed us that you would interview the young man as to the anonymous letters (the defendant thereby referring to and writing of certain obscene letters received by various persons through the mails and well known to said Father Collins and others to have been

so received) and that if there was any further complaints he would be discharged from your institution.

"Since this time, this man has been sent for by the postal authorities, and voluntarily wrote for them, thereby disclosing the authorship of all the anonymously written letters (referring to said obscene letters). At this time all letters (referring to said obscene letters) stopped for a time, only to begin again after the matter had in a sense quieted.

"These letters (referring to said obscene letters) are still being written, three having been received by different persons two weeks ago, and two yesterday. I have now evidence which proves conclusively that the man in your institution and no one else is actually writing these letters (referring to said obscene letters), though no doubt, others are inspiring some of the tents\*. While one of the assistant district attorneys stated that it was a moral certainty as to who wrote these letters (referring to said obscene letters), still there was not sufficient evidence to proceed against him criminally. This evidence is, however, sufficient, I believe, for you to take some action upon, even if it involved this man's discharge, which possibly might result in stopping the vile practice.

"Please understand that both Mr. Macnamara and myself are absolutely dispassionate in the matter, the man is certainly an entire stranger to me and practically so to Mr. Macnamara, but having shown himself as the author of these letters (referring to said obscene letters), I feel that you will agree with others and myself, that he should be punished. Trusting that with your kind help we may succeed in at least stopping this practice, I am,

"Most sincerely yours,

"J. ORMOND GOLDAN."

The complaint then alleges that the "defendant by composing and publishing and causing to be published the above letter meant and charged that this plaintiff had been and was guilty of the crime of sending obscene letters through the mails."

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and

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\*So in record.—[REP.]

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from the interlocutory judgment overruling the demurrer the defendant appeals to this court.

The rule, supported by a long line of authorities, in actions for libel, requires something more than allegations of conclusions of fact; the facts themselves must be alleged from which the conclusion may be drawn. In a case like the present, it is not enough to characterize the anonymous letters mentioned, but the contents of such letters must be set forth in order that it may appear on the face of the pleadings that they are of the character charged. (*People v. Daniky*, 63 Hun, 579, 581, and authorities there cited.) The letter set out in the complaint merely alleges that some one has been writing and sending anonymous letters. The mere characterizing of such letters as obscene by the pleader is not an allegation of fact, but a conclusion from facts, none of which are shown to exist. Writing and sending anonymous letters is not a crime; such letters might be entirely innocent. It is only when they are in fact obscene that the writing and mailing of them becomes a crime, and the facts from which the conclusion is to be drawn should appear in the pleadings. For this reason we think the facts do not constitute a cause of action, and the interlocutory judgment should be reversed, with costs, and the demurrer sustained, with costs, with leave to plaintiff to amend complaint upon payment of said costs.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and SCOTT, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to amend on payment of costs in this court and in the court below.

In the Matter of the Application of THE CITY OF NEW YORK, Respondent, Relative to Acquiring Title, etc., to the Lands, Tenements and Hereditaments Required for the Opening and Extending of Briggs Avenue (Although Not Yet Named by Proper Authority) From the Bronx River to Pelham Bay Park in the Twenty-fourth Ward, Borough of The Bronx, City of New York.

FRANK L. BACON, Appellant.

First Department, March 8, 1907.

**Eminent domain — compensation for taking building erected after proceeding is commenced — measure of compensation therefor.**

As the title to real estate remains in the owner until it is actually taken by eminent domain, the owner may recover compensation for the taking of buildings erected thereon by him after the beginning of the condemnation proceedings, even though they were built for the purpose of recovering compensation from the city.

The question of good or bad faith in moving a building to the land for the purpose of securing compensation is immaterial, but in making the award the commissioners may consider the cost of again moving the building back on portions of the property not taken.

APPEAL by Frank L. Bacon from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 7th day of May, 1906, and in the office of the clerk of the county of New York on the 4th day of January, 1907, confirming the report of the commissioners of estimate and assessment in the above-entitled proceeding.

*Lawrence E. French*, for the appellant.

*John P. Dunn*, for the respondent.

SCOTT, J.:

The appellant, the owner of lots, a portion of which were taken in this proceeding, appeals from the order confirming the report of the commissioners of estimate and assessment, his grievance being that the commissioners have refused to include in their award compensation for a building erected by him under the following circum-



stances: On December 31, 1901, the commissioners were appointed in the proceeding. On June 1, 1902, the appellant, Frank L. Bacon, bought from the city of New York at public action the building in question, which had been taken by the city and compensated for in another street opening proceeding. Under the terms of his purchase Bacon was obliged to take the building off the lot upon which it then stood. On June twenty-sixth he purchased the lots upon which the building now stands and proceeded to prepare a foundation and to move the building. This work was completed by May 20, 1903. The building was so erected upon the lots involved in this proceeding that, in front, it projects about eighteen feet over the property to be taken in this proceeding. The cost to the appellant of moving and re-erecting the building appears to have been about \$3,000. It does not appear how much he paid for it at the auction sale. The amount claimed as compensation for the building is much greater than its apparent cost to the appellant. It was considered by the court below, and we assume for the purpose of this appeal that the appellant deliberately and intentionally placed the house where he did for the purpose of recovering from the city, as compensation for its taking, a very much larger sum than it had cost him. At the time he purchased the lots these proceedings had been in progress for about six months, and it is hardly supposable that, when he bought, he did not know all about the proceedings and just how much of his lots would be taken. The court below was of opinion that because it appeared that appellant had been guilty of bad faith in deliberately placing the building where he did place it, for the sole purpose of enhancing the damages to be collected from the city, he had thereby forfeited any right to compensation for the destruction of or injury to the building. We regret that we are unable to concur in this view. It is perfectly well settled that title to real estate remains in the owner until it is actually taken by the city, and until that time he has the legal right to deal with it as his own, and it is now well settled in this State that the act in force for many years, which forbade the allowance of compensation to the property owner for buildings erected upon his land after the filing of a map showing that the land on which the building was erected was to be there-

after appropriated to public use, was unconstitutional because it deprived the owner of the use of his land without compensation or due process of law. (*Forster v. Scott*, 136 N. Y. 577.) That decision rested upon the clear and strong ground that all that is beneficial in property arises from its use and the fruits of that use, and that whatever deprives an owner of these deprives him of all that is desirable or valuable in the title and possession. We are unable to see why the principle of that case, and those which have followed it, does not extend to and cover the present case. As we view it the owner of the lots had the absolute right, until the city had actually taken title, to use and improve his property as he would, and if he exercised no more than his strict legal right the question of good or bad faith is not important. Of course if an owner, knowing that the property is soon to be taken, places upon it extravagant or inappropriate improvements he runs a risk that the commissioners may not deem the improvements to be worth as much as they cost, but that question does not arise here. It is not to be lost sight of that it is always a matter of much uncertainty when a proceeding of this nature will be concluded, for the city may discontinue at any time. It is a matter of common knowledge that such proceedings often extend over many years. Indeed the motion to confirm the report of the commissioners in this proceeding was not made until February, 1906, four years after the commissioners were appointed, and nearly three years after the appellant had moved and set up his house. That the house had already been condemned and paid for in another proceeding is of no moment, for precisely the same question would have arisen if Bacon had erected a new house where he set up the old one. When the city in the first proceeding acquired the house it might have destroyed it. It elected to sell it, with the requirement that it be moved away. Or it might by resolution of the appropriate board have taken title at any time, but elected not to do so. Either of these steps which the city might have taken, but did not, would have effectually prevented the re-erection and recondemnation of the house. How much should be allowed is a question not now before us. That rests with the commissioners. All that the statute requires is just compensation and all that the city needs to acquire is about eighteen feet of the house. In view of the facility with

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which this particular house can be moved about, and the appellant's opinion, expressed by his acts, that it is an appropriate improvement for lots in this locality, the commissioners may consider that the cost of moving it back on the property not taken for street purposes will be an element to be considered in arriving at the just compensation to be awarded.

The order must be reversed and the report returned to the commissioners for revision in accordance with the view herein expressed.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Order reversed and report remitted to commissioners as stated in opinion. Settle order on notice.

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EDWARD BLEWETT and Others, Respondents, v. COLGATE HOYT, Appellant, Impleaded with LEIGH HUNT, Respondent.

First Department, March 15, 1907.

**Contract to pay moneys from earnings of mines construed — failure of obligee of bond collateral to contract to show damage — defect of parties.**

The defendants purchased mining property for \$175,000, under a contract whereby they were required to pay \$175,000 in addition whenever the defendants or their assigns should receive the same as net earnings or dividends from working the mining claims, or from any sale thereof, or from any corporation which should succeed to the ownership of the mines. The defendants also agreed to develop the mines and employ at least ten men until the \$175,000 had been paid from the net earnings. To secure the performance of the contract a bond was given providing that if work on the mines should be stopped the balance due the obligee should bear interest payable out of the net earnings, in which case the bond should not be forfeited, but that in case of forfeiture the obligee or his assigns should be deemed to be damaged in a sum equal to the balance unpaid, which sum should be treated as stipulated damage. It was also provided that in case of forfeiture the obligors could reconvey the interest in the mines to the obligee, which reconveyance should be in full satisfaction of the penalty incurred for forfeiture.

*Held*, that there was no absolute agreement on the part of the obligors to pay the balance of \$175,000 except as the same might be earned by working the mines;

That the obligors were required to work the mines to insure the realization of earnings and dividends to apply to the payment of the \$175,000;

That an action upon the bond, if maintainable, must be based upon the failure of the obligors continuously to work the mines, and for the breach of that covenant the \$175,000 must be considered as a penalty, the plaintiff being entitled to recover only so much damage as could be shown to have resulted from the breach;

That unless the obligee could show that the obligors could have earned profit by working the mines they had failed to establish damage;

That although the obligors had assigned the mining claims to a corporation they were not thereby relieved from liability, as they became sureties for performance by the corporation of the matters agreed upon;

That as it was shown that the mines were unprofitable, and that the corporation had gone into the hands of a receiver, the plaintiff had failed to show damage.

(Per *INGRAHAM* and *McLAUGHLIN*, JJ.): As the contract and bond contemplated the transfer of the mining property to a corporation, the conveyance by the obligors to such corporation was not such an act as made them liable for the full amount agreed to be paid from the profits or dividends, and the fact that the corporation became insolvent, and that the mines were sold by its receiver, imposed no liability upon the obligors;

That as the plaintiffs sued as assignees of the original obligee it was error to award a judgment in favor of one of the assignees who, refusing to join in the suit, was made defendant, but demanded no affirmative relief from his codefendant, and when the respective interests of the assignees were not shown.

**APPEAL** by the defendant, Colgate Hoyt, from a judgment of the Supreme Court in favor of the plaintiffs and the defendant Hunt, entered in the office of the clerk of the county of New York on the 24th day of July, 1906, upon the decision of the court rendered after a trial at the New York Trial Term, the jury having been discharged, and also from an order denying the said defendant's motion for a new trial.

*John G. Milburn*, for the appellant Colgate Hoyt.

*George F. Harriman* and *Andrew F. Burleigh*, for the plaintiffs, respondents.

*J. Markham Marshall*, for the respondent Leigh Hunt.

**INGRAHAM, J. :**

On the 28th day of November, 1891, an agreement was made wherein one H. G. Bond was party of the first part and Charles L. Colby and Colgate Hoyt were parties of the second part. By that agreement Bond agreed to sell to the parties of the second

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part, or their assigns, for the sum of \$350,000, of which \$50,000 had been paid to the party of the first part, an undivided two-thirds interest in certain mining claims in the State of Washington, the said sum of \$350,000 to be paid in the manner following, that is to say: "the sum of Fifty thousand (\$50,000) dollars paid as aforesaid; the sum of One hundred and twenty-five thousand (\$125,000) dollars on or before the tenth day of December, A. D. 1891, and the balance of One hundred and seventy-five thousand (\$175,000) dollars to be paid as follows: Whenever and as often as the said parties of the second part or their assigns shall receive upon the interest in the said mining claims hereby purchased by them, in net earnings or dividends from the working or operation of the said mining claims, or from any sale thereof, either by themselves in association with the said party of the first part hereto or his assigns, or by any corporation which shall succeed to the ownership of the said claims, such net earnings or dividends shall be paid over to the party of the first part hereto or his assigns, until the said balance of One hundred and seventy-five thousand (\$175,000) dollars has been paid in full." The agreement then contains provisions for ascertaining the net earnings or dividends; and the said parties of the second part further agreed that "they or their assigns will commence to develop and work the said mining claims within the period of two (2) months after a railroad shall have been completed and be in operation to the said mining district of Monte Christo, and that thereafter they will continuously continue to develop and work the said mining claims with a force of not less than ten (10) men until the said sum of One hundred and seventy-five thousand (\$175,000) dollars shall have been fully paid from the net earnings of the mines as aforesaid;" and it was further agreed that the parties of the second part should execute to the party of the first part their bond in the sum of (\$175,000) conditioned on the continuous development and working of the said mines by the parties of the second part, or their assigns, subject however, to the provisions of the agreement and the payment of the said sum of \$175,000 out of the net profits thereof. "Provided however, that if the said parties of the second part shall cease to work and develop the said mines as herein stated for any other reason than injunction as hereinbefore provided, then so much of said balance of One hundred and seventy-

five thousand (\$175,000) dollars as may then remain unpaid shall bear interest at the rate of six per cent (6%) per annum, payable semi-annually out of the said net earnings or dividends of said mines; and so long as the said interest is so paid, the said bond shall not be deemed to be forfeited. It being mutually understood and agreed that in the case of forfeiture of said bond, the said party of the first part, or his assigns, shall be deemed to be damaged thereby in a sum equal to the balance of said sum of One hundred and seventy-five thousand (\$175,000) dollars remaining unpaid at the time of such forfeiture; which said unpaid balance shall be, in such event, deemed and treated as stipulated damages." This agreement was signed by the party of the first part (Bond), the parties of the second part (Colby and Hoyt) and F. W. Wilmans and Edward Blewett, two of the plaintiffs in this action. This agreement having been duly executed, the property was conveyed to Colby and Hoyt and the sum of \$175,000 paid in cash and a bond was given, dated the 10th day of December, 1891, by which Colby and Hoyt were held and firmly bound unto Hiram G. Bond in the full sum of \$175,000 jointly and severally. The bond recited the execution of this contract of November 28, 1891, between Bond and Colby and Hoyt which was set out in full; that Bond at the request of Colby and Hoyt had conveyed to George S. Brown and Francis H. Brownell, by deed sufficient in form to comply with said contract, an undivided two-thirds interest in said mining properties in the contract described, the said conveyance being in trust for the obligors, Colby and Hoyt, and that the sum of \$175,000 of such purchase price remained to be paid in the manner provided in the said contract, and provided: "Now, therefore, if the said obligors or their assigns shall well and truly perform each and every of the covenants, promises and agreements, in said contract stipulated to be performed by said obligors, subject, however, to each and every of the provisos and limitations to such covenants, promises and agreements in said contract contained, then this obligation shall be void and of no further force or effect. But if the said obligors or their assigns shall fail, refuse or neglect to perform any of such covenants, promises or agreements (subject, however, to the provisos and limitations aforesaid), then, in any such event, this bond shall remain in full force and effect, and become absolute."

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The bond further provided that if the obligors or their assigns should cease to work and develop the said mines for causes other than injunction, as specified in the contract, then so much of the balance of \$175,000 as should then remain unpaid should bear interest at the rate of six per cent per annum, payable semi-annually *out of the said net earnings or dividends of said mines*; and so long as the said interest was so paid, the bond should not be deemed to be forfeited. It was further understood and agreed that in case of forfeiture of this bond, the obligee or his assigns should be deemed to be damaged thereby in a sum equal to the balance of the said sum of \$175,000 remaining unpaid at the time of such forfeiture, which unpaid balance should be, in such event, deemed and treated as stipulated damages; with a further provision that in case of such forfeiture Colby and Hoyt could reconvey the undivided two-thirds interest in said mines to Bond or his assignee, and which reconveyance should be deemed in full satisfaction of the penalty incurred for such forfeiture and from the penalty incurred in the bond, and that in case of forfeiture of the bond, the obligors should have the right to make against such stipulated damages the set-offs provided in said contract and that the bond should be surrendered for cancellation upon the execution and delivery to the obligee in the bond, or his assigns, of the mortgage annexed thereto. There was annexed to this bond a form of a mortgage which was executed by Bond, Wilmans and Blewett, but never seems to have been executed by Colby and Hoyt.

The complaint alleges that the said Bond and the plaintiffs and the defendant Hunt have fully performed each and every of the conditions of the said bond upon their part to be performed; that the defendant Hoyt and Colby, and his heirs, executors and administrators, obligors in said bond, have failed, neglected and refused to carry out, fulfill and perform the conditions of said bond as therein provided in the certain particulars specified. The complaint then alleges that by reason of the premises and of the breaches of the conditions of the said bond these plaintiffs and the said defendant Hunt have been and are damaged in and to the sum of \$136,718.75, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1898.

The case came on for trial at a Trial Term of the Supreme Court

Before the case was finally disposed of the jury were discharged and it was consented that the court should try the case without a jury. Whereupon the court filed its decision, finding the execution of the contract and the execution of the bond alleged in the complaint; that on the 1st day of August, 1902, Hiram G. Bond assigned and transferred said bond or contract and the principal sum remaining due and payable thereon, amounting to twenty-five thirty-seconds thereof, to the plaintiffs and the defendant Hunt and that they are now the owners and holders thereof to the amount and extent aforesaid; that the said Bond and the plaintiffs and the said defendant Hunt have fully performed each and every of the conditions of the said bond or contract upon their part to be performed; that the two-thirds interest in the said mining claims covered by said contract was subsequently conveyed to a corporation; that thereafter the title to said mining claims was held by the said corporation until the 4th day of November, 1898, on which date it was conveyed by William C. Butler, receiver of said corporation, to Josiah B. Crooker, and thereafter on the 10th day of July, 1899, conveyed by said Crooker to the Monte Christo Mining and Concentration Company; that the defendant Hoyt and Colby and his heirs, executors and administrators, obligors in said bond or contract, failed, neglected and refused to carry out, fulfill and perform the conditions of said bond or contract, in manner, form and substance as therein provided, as alleged in the complaint; and, as a conclusion of law, that the defendant Hoyt was indebted to the plaintiffs and the defendant Hunt in the sum of \$136,718.75, with interest at the rate of six per cent per annum from the 1st day of January, 1898; and judgment was directed accordingly.

Upon the trial Bond, who was a party to the contract and was the obligee in the bond sued on, was examined as a witness for the plaintiffs. The original bond and contract having been introduced in evidence, the witness testified that he received the \$175,000 on the execution of the instrument, and that neither Colby nor Hoyt, nor their assigns, nor grantees of the property named in the deed and in the bond and agreement ever offered to reconvey to him the property named in the bond and agreement or any of it; that no demand was made upon him by either the defendant Hoyt nor Colby, nor their assigns or grantees to perform any of the obligations to be



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performed by him; that the mortgage annexed to the bond never was executed, nor was any offer to reconvey the property named in the contract made. The plaintiff then introduced the conveyances by which this property was conveyed to the Pride of the Mountains Mining Company and an order dated April 18, 1898, appointing a receiver of that company in an action wherein J. B. Crooker was plaintiff directing the receiver to report to the court the financial condition of the company; a report by the receiver showing that the company was indebted in the sum of \$168,000; that the assets of this company were of extremely doubtful value; that since the destruction of the railroad it was impossible to work the mines, and there was no prospect of being able to realize upon any of the assets except by a direct sale of all the assets of the company; that the company had borrowed \$125,000 and issued therefor debenture bonds; that the proceeds of the sale of said debenture bonds were received by the corporation and by it used in the payment of outstanding bills and obligations and in the further development and operation of its mining property; that the defendant company had not been able to operate any of its mines at a profit, and a judgment which had been entered in the action directing the receiver to sell the property, the proceeds of such sale to be distributed among the creditors of the company. The receiver then sold the property to Crooker, creditor of the company, for the sum of \$167,501.95, being the amount of the company's indebtedness. That sale was confirmed and the receiver was directed to execute a deed and bill of sale of the property.

In determining the question as to the liability of the obligors upon this bond, there are two questions which require consideration; the *first* is whether the condition of the bond has been broken so as to impose any obligation upon the obligors, and the *second* is whether, if the condition of the bond has been broken, the obligee is thereupon entitled to a judgment for the full amount of the bond or is only entitled to the damages proved to have been sustained by him by reason of the violation, the bond being upon condition that it should be void if the obligors or their assigns should well and truly perform each and every of the covenants, promises and agreements in said contract stipulated to be performed by said obligors. To entitle the plaintiffs to recover they must prove that the obligors on the bond had failed to comply with the

obligations of this contract. The contract provided for the purchase of these mining claims for \$350,000, of which \$175,000 was to be paid in cash and \$175,000 was to be paid out of the earnings or dividends derived from the working of the mining claims or the sale thereof. The obligors did not assume an obligation to pay this \$175,000. Their entire obligation was performed if they paid to the obligee all of the net earnings produced or realized from the working or sale of the mines. The defendants agreed in good faith to operate the mines, but if they failed to operate the mines so long as they paid interest on the amount of \$175,000 out of the net earnings or dividends of said mines there should be no forfeiture of the condition of the bond. The failure to pay any portion of this sum was not a violation of any provision of the contract unless it was further proved that some profits or dividends had been realized from the working, operation or sale of the mines. What Hoyt and Colby agreed to do was that whenever and as often as they "or their assigns shall receive upon the interest in the said mining claims hereby purchased by them in net earnings or dividends from the working or operation of the said mining claims or from any sale thereof either by themselves in association with the said party of the first part hereto or his assigns or by any corporation which shall succeed to the ownership of the said claims, such net earnings or dividends shall be paid over to the party of the first part hereto or his assigns until the said balance of" \$175,000 had been paid in full. The parties contemplated that the mines should be worked either by Colby or Hoyt or by a corporation which should succeed to the ownership of the claim, but it was the receipt by Colby and Hoyt of money realized from working or operating of or selling the mining claims which would create an obligation to pay anything to Bond or his assigns, and there is no evidence of any kind, nor does the court find that either Colby or Hoyt received in any way any earnings or dividends from the working or operation of the mining claims or any money from a sale thereof or in any other manner. There was a further covenant that statements of accounts and settlements of the operation of said claims should be made quarterly in each and every year in order to ascertain the net earnings or dividends accruing upon the said interest in said claims purchased to the end that the accounts payable to Bond, if any, on account of

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the balance should be determined and paid quarterly in each and every year, but I do not find evidence that this covenant was broken. No demand for such accounts was made; and there was no agreement that the obligors should be compelled to find the obligee in order to submit the accounts to him; and in the absence of proof that there were net earnings or money received by Colby and Hoyt which were applicable to pay to Bond under the contract, there was no breach by the obligors. Colby and Hoyt also covenanted that they would commence to operate and work the said mining claims within a period of two months after a railroad should have been completed and be in operation, and that thereafter they would continuously continue to develop and work the said mining claims with a force of not less than ten men until the said sum of \$175,000 was fully paid from the net earnings of the mines aforesaid. The plaintiffs failed to prove that Colby and Hoyt did not develop and operate the mining claims, that the mining claims were not developed so as to expose or produce all ore of every kind that was capable of being produced from them, or that the development of the claims was not fully completed by Colby and Hoyt. What was conveyed to them were mining claims; what they agreed to do was to develop and work the said mining claims until the whole sum of \$175,000 was repaid to the obligee of the bond. To "develop" is defined by Webster to be "To free from that which infolds or envelops; to lay open by degrees or in detail; \* \* \* to disclose; to produce or give forth." And by the Standard Dictionary, "To uncover or unfold; \* \* \* bring to light by degree, work out in detail."

Thus, to develop a mining claim is to uncover or bring forth that which it produces or can produce; but it could not have been the intention of the parties that after this mining claim had been developed and worked, that the obligors should still be forced to go on working the claims when they were exhausted and nothing remained to develop or work. The burden of proof was upon the plaintiffs to show that the defendants had violated the conditions of this bond. The bond was conditioned upon the performance by the obligors of the contract which was made a part of it. The obligors contracted that they would proceed to develop and work the mining claims. They did develop and work the mining claims between the time that this contract was executed, the 28th day of November,

1891, and the appointment of the receiver, April 18, 1898, a period of over six years. If the mining claims had been developed and worked until they were exhausted and there was no longer anything to work, would the obligors have violated the contract because they did not pay the debts of the corporation incurred in developing and working the mining claims when nothing had been or could be produced? What was contemplated and what obligations the parties assumed must appear from a fair consideration of the terms of the contract, and when the mines had been fully developed and worked and it was disclosed that there was no ore that could be mined or nothing from which could be realized on the further development and working of the mines, profit or dividends there was nothing to require the obligors to go on indefinitely with the working and development of a valueless and worthless mining claim. It was contemplated that the obligors might be forced to suspend the working of the mines, and that contingency was provided for by the provision of the contract that if the obligors "shall cease to work and develop the said mines as herein stated for any other reason than injunction as hereinbefore provided, then so much of said balance of One hundred and seventy-five thousand \$175,000) dollars as may then remain unpaid shall bear interest at the rate of six per cent (6%) per annum, payable semi-annually out of the said net earnings or dividends of said mines; and so long as the said interest is so paid the said bond shall not be deemed to be forfeited."

Under this provision there was no absolute obligation to pay interest to prevent a forfeiture, but only to pay when there were net earnings or dividends applicable to the payment of the interest. The parties, therefore, contemplated the time when the development or working of the mines should become impossible or impracticable, and then the sole obligation that the purchaser of these mining claims assumed was that interest should be paid on the amount remaining due out of the net earnings or dividends received from the mines. That was the only obligation that a stopping of the development and mining of the mine imposed on the obligors, and when the ore, or whatever it was expected would be taken from these mining claims, was exhausted, or it was ascertained that there was no mineral that could be mined, it seems to me that any

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obligation of the purchasers to make further payments, or to continue to work an exhausted or valueless mining claim terminated. It was only upon a failure of these purchasers to carry out the obligations assumed by their contract which imposed a liability upon them under this bond, and while it is true that they might have terminated their liability at any time by reconveying the property to the vendor, or by giving to the vendor a mortgage upon the property, or even after there had been a forfeiture of the bond, they might have satisfied any claim that the vendor could have against them by the retransfer of the property, there was no obligation on them to make such reconveyance or mortgage, and such a reconveyance or mortgage becomes impossible if the mining claims had been conveyed to a corporation as the contract contemplated. We are dealing with an obligation to pay to the vendor or his assigns \$175,000. An obligation to pay that must be found within the contract, the performance of which was secured by the bond; and if a fair consideration of the contract itself fails to disclose any covenant or obligation on behalf of the vendee which they have failed to comply with, then the condition of the bond was not broken and the plaintiffs cannot recover.

The fundamental error upon which the judgment below was granted and which pervades the argument of the learned counsel for the respondents is that by this agreement the obligors of this bond assumed to pay \$175,000 in one of three ways, either by the payment of the money, the delivery of the mortgage, or a retransfer of the property. I fail to find any such obligation imposed upon the obligors by the contract. They agreed that the mining claims should be developed and worked either by themselves or by a corporation to which the claims were to be transferred, and they also agreed that any profits or dividends realized from such development and workings or any moneys realized from a sale of the mining claims should be devoted to the payment of this sum of \$175,000, and that, I think, was the extent of their obligations. They could satisfy these obligations by the execution of a mortgage or the retransfer of the mining claims, but there is no obligation, express or implied, to pay to the obligee of the bond any sum of money on account of this \$175,000 except what they should receive as profits from the working of the mining claims as dividends from the cor-

poration to which the claims had been assigned or from the proceeds of the sale of the claims. In the absence of proof that any such sum of money had been received by the obligors there was no basis for a finding that the obligors had failed to pay to the obligee or his assigns any money due under the contract.

But it is said that the obligors having by the transfer of the mining claims to the corporation put it out of their power to comply with the contract to further continue the development and working of the mines, therefore became liable to pay the whole amount that would have been due had they received \$175,000 in profits or dividends or from a sale of the property. But such a disposition of the mining claims was distinctly recognized by the contract, and when such a sale or disposition of the mining claims had been made by the obligors it was then expressly provided what obligation the obligors assumed. They were to apply, on account of this sum of \$175,000, any dividends that they received from the corporation organized to develop and work the mines, or any sum of money that they received on account of the sale of the mining claims to the corporation. The transfer of the claims to the corporation would necessarily vest in the corporation the title to the property, so that the claims would be subject to the debts incurred by and to legal proceedings taken against the corporation. The fact that the obligors did what the contract contemplated they should do — convey the claims to the corporation for the purpose of developing and working them — was not such an act as made the obligors liable for the full amount that was to be paid when profits or dividends from the working of the mining claims had been received. If there was any obligation imposed upon the obligors because of this transfer to the corporation, it arose immediately upon the transfer of the claims to the corporation. But such a transfer was clearly contemplated by the contract and was not a violation of it by the obligors. The fact that the corporation to whom the mining claims had been assigned, after several years' development and working of the claims without being able to realize any profits, became insolvent, and that the mining claims were sold by a receiver of the corporation appointed in proceedings against it, was not the result of any act of the obligors which imposed upon them any liability to the obligee. If there was any breach of the contract it must have been by the

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original transfer to the corporation ; but, as before stated, such a transfer was contemplated by the contract and was one of the methods provided for by which the profits from working the claims could be realized so that payments could be made, and there was certainly no obligation imposed by the contract by which the debts of this corporation must be paid to avoid a transfer of its property in payment of its indebtedness. I do not think, therefore, that it was proved that the obligors upon this bond had violated any of the provisions of the contract and, therefore, no cause of action accrued.

This conclusion renders it unnecessary to determine whether or not, under the terms of this bond, a breach of the contract imposed a liability for the full amount of the bond or only for the amount of damages that the obligee sustained by a breach of the conditions of the contract. I think, however, that the bond was for a penalty and that a recovery upon it must be limited to the amount of the damages sustained in consequence of the violation of the conditions of the contract. The bond is in the usual form by which the obligors are held and firmly bound unto the obligee for the full sum of \$175,000, conditioned upon the performance by the obligors of the covenants, promises and conditions in a contract which was made a part of the bond. This would be clearly a penalty restricting the obligee to a recovery of the amount of damage actually sustained by him by reason of a breach of the contract, were it not for the further provision of the bond that "it being mutually understood and agreed, that in case of forfeiture of this bond, the said obligee or his assigns, shall be deemed to be damaged thereby in a sum equal to the balance of said sum of One hundred and seventy-five thousand (\$175,000) dollars remaining unpaid at the time of such forfeiture, which unpaid balance shall be, in such event, deemed and treated as stipulated damages." But this provision apparently contemplated the breach of a substantial condition of the contract by which the contract could not be in any sense performed. A technical breach of one or more provisions of the contract not relating to an entire abrogation of it, such, for example, as a failure to render an account of earnings when demanded, which would clearly impose no damage upon the obligee, would not work a forfeiture so as to compel the obligors to pay the whole amount of \$175,000.

In *Caesar v. Robinson* (174 N. Y. 492) where the sum of \$1,000

was deposited as security for the faithful performance of the contract, it being provided that in case of any breach thereof said amount should be retained as liquidated damages for such breach, the court said: "The character of the deposit, whether liquidated damages or a penalty, depends upon the intention of the parties as disclosed by the situation and by the terms of the instrument. The deposit is not necessarily to be regarded as liquidated damages, although it is expressly so stated in the instrument. Whether it is that or a penalty depends upon the nature of the transaction and the intention of the parties. \* \* \* A provision in a contract such as that now under consideration will be treated as liquidated damages only in those cases where from the nature of the transaction the actual damages consequent upon a breach of the contract are incapable of accurate measurement, or where the sum specified in the instrument is not out of all proportion to any damages which could possibly arise from a breach." And in *Ward v. Hudson River Building Co.* (125 N. Y. 230) it is said that: "Where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportionate to the presumable or probable damage, or to a readily ascertainable loss, the courts will treat it as a penalty and will relieve, on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance."

In this case the contract provided for the payment of the sum of \$175,000 out of the proceeds or dividends received by the obligors from the development and working of these mining claims, or from a sale thereof, and it was to secure the performance of this contract that the bond was executed. It would seem to have been conceded that the mining claims transferred were developed and worked for several years at a large cost; that no profits or dividends were ever realized, and that finally the workings were abandoned because the corporation to whom the mining claims had been transferred had become insolvent, such insolvency being caused by the loss sustained in attempting to develop and work the claims. This, clearly, was not such a violation of the contract as was contemplated by the parties as imposing upon the obligors a liability for the full amount of the penalty of the bond. Such penalty, in the absence of any proof that the mining claims were of any value at the time the



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development and working of them ceased, would be the imposition of a penalty for failure to perform an impossibility — the obtaining of profits or dividends from mining claims which were incapable of producing any profits or dividends. This brings the case within the rule stated in the authorities before cited, that where a penalty of a sum of money is imposed out of all proportion to any damage that could possibly be sustained, it is to be treated as a penalty and not as liquidated or stipulated damages.

There is another objection to this judgment which, though somewhat technical, seems to be fatal. The plaintiffs commenced an action to recover their interest in this bond, evidenced by an assignment by the obligee which assigned the bond to the plaintiffs and the defendant Hunt. The bond was under seal and was payable to H. G. Bond. Before the action was brought Bond executed an instrument reciting that he held twenty-five thirty-seconds of the bond in trust for Leigh Hunt, Edward Blewett, Fred W. Wilmans and James M. Wilmans, who were the beneficial owners thereof, and, therefore, in consideration of the premises and of the sum of one dollar, Bond assigned and set over unto these four persons "the said bond to the extent of twenty-five thirty-seconds thereto, to have and to hold the same according to their respective interests therein." Hunt refused to join in this suit and was made a party defendant. He interposed an answer which asked no judgment and demanded no affirmative relief from his codefendant Hoyt, and no copy of that answer was served upon Hoyt. No judgment in this action, therefore, could be given in his favor against Hoyt; but the court awarded judgment in favor of the three plaintiffs and the defendant Hunt against Hoyt for the full amount of the bond. There was no evidence to show what interest Leigh Hunt had. For all that appears he might have owned all but a nominal amount, and yet he was entitled to no judgment and could have none awarded to him in this action. The assignment was not to these four persons equally, or from which equality could be inferred, for it was assigned to them to have and to hold the same according to their respective interests therein; and to justify the recovery sought in this action, the plaintiffs' respective interests in the bond would have to be proved and a

judgment awarded for their interests, and not for the whole amount due. In the form in which it is, it seems that the judgment cannot be sustained.

The judgment should, therefore, be reversed and a new trial ordered, with costs to defendant Hoyt to abide the event.

McLAUGHLIN, J., concurred.

SCOTT, J. (concurring):

I concur in the reversal of the judgment appealed from, but I do not agree that the obligors on the bond released themselves from its obligations by transferring the property, or that the only liability they can be charged with under the bond, if any, is one which arose when they made the transfer.

Upon a careful reading of the contract and the bond it will be seen that nowhere is there an absolute agreement on the part of the obligors to pay the sum of \$175,000. The contract provides that that sum shall be paid "as follows," and then follows careful provisions for paying the amount out of earnings. The bond provides that the \$175,000 shall be paid "in the manner provided in said contract," so that neither in the contract nor the bond is there any agreement to pay the \$175,000 otherwise than out of the earnings or dividends produced by working the mines. I think that it clearly appears that the basic idea of the agreement was that the \$175,000 should, if paid at all, be paid out of earnings, and that the mines, if properly worked, would produce enough to pay that sum.

The bond upon which this action is founded is not, therefore, conditioned to pay \$175,000 absolutely, whether it shall be earned or not. It is conditioned for the fulfillment by the obligors, or their assigns, of the covenants, promises and agreements therein recited.

These are to pay over all net earnings and dividends as received, up to \$175,000; to make statements and settlements of accounts, and to commence to develop and work the mines within a certain time, and to keep not less than ten men at work. The provisions as to a reconveyance and for substituting a mortgage for the bond are not in the nature of obligations assumed by the obligors, but merely options given to them whereby they might, if they saw fit, relieve themselves from all obligation.

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The obligations of the bond, therefore, really are reduced to two, viz.: *First*. To pay the \$175,000 as and if received out of net earnings or dividends. It is conceded that there have been no net earnings or dividends, and consequently there has been no default in this regard.

*Second*. That the defendants, or their assigns, will do certain things with respect to the working of the mines, designed to insure the realization of earnings and dividends, and their proper application to the payment of the \$175,000.

It is conceded that neither the obligors on the bond nor their assigns have continuously worked the mines, as it was agreed they would do, and it is for this breach that the present action must depend if it is to be maintained at all.

In this aspect the sum of \$175,000 mentioned in the bond must be considered as a penalty, leaving plaintiffs to recover only so much damages as can be shown to have resulted from this breach. (Code Civ. Proc. § 1915.) In other words, the obligors' breach was that they did not so work the mines as to produce the \$175,000, which, if earned, would have been payable to plaintiffs, but unless it is made to appear that, if the obligors had continuously worked the mines they would have been able to earn the \$175,000 or some part thereof, the plaintiffs have suffered no damage from the failure so to work. The fact that the obligors assigned the mining claims to a corporation is of no importance. Both the contract and the bond are full of clauses and phrases showing that such an assignment was contemplated by the parties. And the assignment had practically no effect upon the relation of the parties to this action, for the covenant of the obligors was that they or their assigns would do the things covenanted for. Thus the obligors became in effect sureties that their assigns would do the things agreed upon, and upon the failure of the assigns to do them, the promise of the obligors was broken. Since there was no evidence justifying a recovery under this view of the case I am for reversal of the judgment and a new trial.

PATTERSON, P. J., and CLARKE, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

ISAAC SCHREIBER, Appellant, v. JULIA ELKIN, Respondent.

First Department, March 15, 1907.

**Vendor and purchaser — contract to convey title free from incumbrances  
— failure of vendor to clear title.**

In an action by a vendee for specific performance or for damages on a breach of a contract to convey lands, it appeared that the property was to be conveyed free of incumbrances except as specifically stated, and also free from orders of the tenement house department to date of contract, which orders, if any, were to be removed by the vendor. It was shown that the premises were subject to a lease then unexpired, which contained a clause that in the event of a sale by the owner the lessee would surrender the unexpired term for a sum stated. It also appeared that the tenant had offered to surrender and that the vendor had actually ousted him, but made no effort to clear the title of the tenement house department orders. On all the evidence,

*Held*, that a finding that the vendor was unable in good faith to complete her contract was not warranted by the evidence, and that the plaintiff was entitled either to specific performance or to damages.

INGRAHAM, J., and PATTERSON, P. J., dissented, with opinion.

APPEAL by the plaintiff, Isaac Schreiber, from a judgment of the Supreme Court entered in the office of the clerk of the county of New York on the 13th day of September, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

*Charles Strauss*, for the appellant.

*Stillman F. Kneeland*, for the respondent.

SCOTT, J. :

Plaintiff sues for specific performance by a vendor of a contract for the sale of real estate, or for compensatory damages, which upon the trial were stipulated to be \$4,000. The court awarded plaintiff a judgment for the amount paid down on the contract and the expense of examining the title, and from this judgment plaintiff appeals. The sole question in the case is whether the evidence justified the finding that defendant was *in good faith* unable to comply with the contract. If it does not, the plaintiff is entitled either to performance or to compensatory damages. The contract provided that the property should be conveyed free of all incumbrances, except some specifically stated, and also free from all orders

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of the tenement house department up to the date of the contract as to which, if there were any, the vendor agreed that she would cause them to be satisfied and removed. It appeared, upon an examination of the title, that in addition to the specified incumbrances, the property was incumbered by a lease held by one Weinstein, and that there were a number of tenement house orders against the property, none of which were serious or of such a nature that they could not have been complied with at comparatively small expense. The vendee refused to take the title incumbered by the lease and the violation orders, and insisted that it was the vendor's duty to clear the title in these respects. The vendor did not clear it, and, so far as appears, made no effort to do so, and the question is whether or not she acted in good faith in this regard. The lease, dated on March 25, 1904, was for the term of five years from April 1, 1904, but contained a clause to the effect that in the event of any sale of the aforesaid premises and on payment to the lessees of a sum specified in another clause, they would execute and deliver to the landlord a properly acknowledged surrender of lease, granting and conveying unto the landlord any unexpired term of the lease. This clause seems to have established a conditional limitation of the term, so as to put it within the power of the vendor to terminate the lease if she had seen fit to do so. (*Miller v. Levi*, 44 N. Y. 489.) In point of fact the tenant, on the day first fixed for closing the contract, and again on the trial, offered to surrender the lease, and it appears that before the trial took place the vendor had actually ousted him. The landlord held \$500 deposited by the tenant as security for his fulfillment of the covenants of the lease, and it was therein provided that if the landlord should sell the premises during the first year of the lessee's term (as she would have done if she had completed her contract with plaintiff) the tenant should receive an indemnity of \$600. The date first fixed for the completion of the contract was December 20, 1904, when there attended at the place agreed upon the vendor and the vendee and their attorneys, the vendor's husband and Weinstein, the tenant. The vendee made tender of performance, but demanded that the lease and the violation orders be removed. The tenant offered to surrender the lease, but a discussion arose as to the violations, the vendor claiming that it was the

duty of the tenant to remove them. The tenant apparently recognizing this obligation, offered to leave in the landlord's hands, to secure the removal, the sum of \$300 in addition to the \$500 then on deposit with her. This offer does not seem to have been satisfactory to the vendor, and an adjournment was had until December twenty-seventh, with a view of having the title cleared up, but when that day arrived nothing had been done by the vendor, and, so far as appears, no effort had been made by her to do anything towards removing the incumbrances. The vendor offered to allow the vendee, out of the purchase money, \$500, the amount deposited by the tenant as security, and \$600, the amount to be paid the lessee as indemnity upon surrendering his lease, leaving the vendee to settle with the tenant as to the surrender of the lease and the removal of the violation orders. This the vendee refused to accept and, as we think, justifiably. The vendor thereupon made no further effort to clear the title, offering to return to the vendee his down payment and expenses, which was refused by the vendee, who thereupon began this action. Upon these facts we are unable to agree with the court below that the vendor showed herself to be unable in good faith to complete her contract. On the contrary, it is quite evident that, if she had desired to do so, she could have cleared the title and made a good conveyance, and there are not lacking in the evidence suggestions that her real reason for refusing was that she had repented of her bargain. Under these circumstances the plaintiff was entitled either to a specific performance or to compensatory damages.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

McLAUGHLIN and CLARKE, JJ., concurred ; PATTERSON, P. J., and INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I think this judgment should be affirmed, as I think it appears that neither the plaintiff nor the defendant was ready or willing to complete the performance of the contract. When the contract was to be completed, the tenant attended with the defendant ready and willing to surrender his lease upon payment of the amount to which he was entitled on the surrender. The defendant then

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offered to pay or deposit with the plaintiff. In relation to the violations of the Tenement House Act\* it appeared that the plaintiff offered to deposit a sum of money which was assumed would make the changes required by the tenement house commissioner. The property was in the possession of a tenant who was bound to make these changes under his lease. He had failed to do so, and when the vendor offered to deposit the money sufficient to make the changes, I think the defendant at least showed his good faith and justified the court in finding that he was then in good faith ready and willing to complete the contract. No objection was made to the amount, and the notice of the tenement house commissioner merely required certain changes to be made to make the property conform to the requirements of the law. On the subsequent day to which the closing of the matter had been adjourned the tenant did not appear, but the defendant renewed the offer to allow to the plaintiff the amount required to be paid to the tenant under the lease for the surrender of it, and also an amount sufficient to reimburse the plaintiff for any changes that he would have to make in consequence of the violation of the Tenement House Act. This was again refused by the plaintiff who then brought this action. Under these circumstances I think the court was justified in finding that the defendant offered in good faith to do all that he could to comply with the contract, and that the plaintiff was limited to a recovery of the amount that he had actually expended in carrying out the contract.

PATTERSON, P. J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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\* See Laws of 1901, chap. 334, as amd.—[REP.]

JAUNCEY KETCHUM, Respondent, v. NEW YORK CITY RAILWAY  
COMPANY, Appellant.

First Department, March 15, 1907.

**Railroad — when rules as to issue of transfers not unreasonable.**

A railroad may adopt and enforce rules respecting the conduct of its business for its own protection, provided they do not seriously inconvenience passengers or subject them to probable loss or deprive them of legal rights.

The rule of a street railroad which issues transfers for several intersecting lines that a passenger must demand the transfer at the time of payment of fare is not unreasonable, for the company is entitled to protect itself against dishonest persons who may seek to obtain more than one transfer.

(Per LAUGHLIN, J.): Said rule is reasonable so long as transfers issued are unlimited as to the points at which they may be used, and while the company permits passengers receiving transfers to remain on the car to the end of the line without using them.

APPEAL by the defendant, the New York City Railway Company, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 11th day of December, 1906, affirming a judgment of the Municipal Court of the city of New York in favor of the plaintiff entered on the 9th day of October, 1906.

*James L. Quackenbush*, for the appellant.

*E. V. R. Ketchum*, for the respondent.

SCOTT, J.:

This appeal involves only the question as to the reasonableness of a rule adopted by the defendant corporation requiring that passengers desiring transfers must obtain them from the conductor at the time of paying fare, and that no transfers will be issued on the cars at any other time.

The defendant owns or controls and operates a large number of street car lines in the city of New York, some running approximately north and south, and others approximately east and west, the intersecting points being transfer points.

The statutory duty to give transfers is contained in section 104 of the Railroad Law (Laws of 1890, chap. 565, § 105, as renumbered



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and amend. by Laws of 1892, chap. 676) and reads as follows: "Every such corporation entering into such contract shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand and without extra charge give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party."

It is to be noted that the statute does not contemplate the giving of a transfer to every passenger, but to any passenger who, wishing to make a continuous trip, shall demand a transfer. The plaintiff's contention is that the statute gives to each passenger the absolute right to demand a transfer at any time during the trip, and that to fix one particular time at which alone such a demand will be complied with is unreasonable and unlawful. The defendant urges that the regulation adopted by it complies with the statute, is reasonable and, therefore, lawful. That a common carrier of passengers not only has the right, but is bound to make rules and regulations to insure the safe, effective and comfortable operation of its corporate business is undoubted (*Barker v. Central Park, etc., R. R. Co.*, 151 N. Y. 237; *Montgomery v. Buffalo R. Co.*, 165 id. 139), and it is equally clear that it is entitled to adopt and enforce rules designed to protect itself against fraud and imposition. As was said in an early case: "Such regulations as will enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers and protect itself from wrong and imposition it has an undoubted right to prescribe, provided such regulations are reasonable and just." (*Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 463.) The first duty of a railroad company is undoubtedly to its passengers, and its highest obligation to obey the law. Subject to the performance of these duties and obligations it

is its right to protect itself, for with the duty of carrying passengers is coupled the right of receiving lawful compensation therefor. Hence it has been held in many cases that it was within the right of a railroad company to make regulations to insure that no passenger who failed to pay his fare should be carried, and these regulations have often been upheld even if they imposed some slight inconvenience upon the passenger. It is of common knowledge that upon steam railways generally, and upon the elevated and underground railways in this city, passengers are required to pay full fare before entering the cars, and consequently before any service has been rendered, but no case has questioned the reasonableness of this regulation. In *Walker v. Dry Dock, etc., R. R. Co.* (33 How. Pr. 327) it was held by the General Term of the Court of Common Pleas that, where coupon tickets were sold, a regulation that the coupons must be torn off by the conductor, and would not be received if otherwise detached, was a reasonable regulation to protect the company from imposition. In *Elmore v. Sands* (54 N. Y. 512) a regulation that a ticket must be used on the day it was purchased was held to be a reasonable rule to protect the company from fraud. So, also, it has been held reasonable to require a passenger to show his ticket when required by the conductor to do so (*Hibbard v. N. Y. & Erie R. R. Co., supra*), and to require passengers to surrender tickets before reaching the station nearest their destination without receiving any other evidence of the payment of fare. (*Vedder v. Fellows*, 20 N. Y. 126.) Many other cases might be cited to the same general effect, but it is unnecessary to multiply authorities to support a doctrine so well established as that a railroad company may adopt and enforce rules respecting the conduct of its business for its own protection, provided they do not seriously inconvenience their passengers, or subject them to probable loss, or deprive them of any right to which they are entitled by law.

In considering the reasonableness of the rule sought to be upheld by this defendant two questions present themselves: *First*, is it reasonable to fix upon some one point in each trip at which a passenger wishing a transfer must demand it, and, *secondly*, is it reasonable to fix as that point the time at which the fare is paid, instead of some other time, as for instance when the passenger alights.

It is certain that each passenger is entitled to but a single trans-

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fer, and the company is clearly entitled to protect itself, if possible, against dishonest passengers who might seek to obtain more than one. The evidence shows, and common experience verifies the fact, that at certain hours the defendant's cars are very crowded, and it would be imposing upon the conductors an impossible task to require them to carry in memory every passenger to whom has been given, in the course of a long trip, a transfer, and although in a given case a conductor might be quite sure that he had given a transfer to a demanding passenger, the heavy penalty imposed by the Railroad Law in case of refusal, with the impossibility of producing any proof beyond his own recollection, would make it very hazardous to refuse to give a transfer upon demand. If, therefore, the statute must be so construed as to entitle a passenger to demand and receive a transfer at any time during his trip, the company would be practically powerless to protect itself against repeated demands by the same passenger. It does not in our opinion require such a construction, and we consider that it is reasonable to make a rule fixing upon a definite point in each trip when the right to demand a transfer shall be exercised. Is it reasonable to fix the time at which the fare is paid as the time for making the demand? Assuming that some one point of time may lawfully be fixed, there are two obvious points which suggest themselves as appropriate. One is the time of paying the fare; the other is the time of disembarking at the point of intersection. While it is the duty of the court, when called upon, to pass upon the reasonableness of a regulation, it is no part of its duty to make regulations, or even to suggest alternatives for those made by the company. *Prima facie* when it comes to a question of choice between two possible methods, the judgment of the managers of the railroad is entitled to some weight, for they are to be presumed to be cognizant of the conditions, requirements and difficulties of the service, and it is not to be lightly assumed that they have adopted a regulation without due reflection, or that they deliberately seek to avoid their statutory obligations. It was suggested upon the argument that there were two reasons why it would be inconvenient and perhaps dangerous to the traveling public generally to fix the time of disembarkment at the transfer point as the time of giving out transfers on demand. One reason was that at this particular time the conductor will probably be quite

sufficiently occupied in seeing to the safety of the passengers who might be getting off and on the car. The other reason was that if the transfers were given out as passengers disembarked the stops would necessarily be longer at points of intersection, and thus the general movement of the cars would be retarded. It cannot be said that these reasons are without weight. In considering the reasonableness of the particular regulation in question it is proper to consider the system of transfers adopted by defendant, of which proof was made in the court below, and which, as we consider, have an important bearing upon the reasonableness of the rule now under consideration. As already said, the system of railroads operated by defendant includes a number of longitudinal lines, running approximately north and south, and a number of intersecting transverse lines running approximately east and west. Under the system adopted by defendant a passenger starting to ride upon a longitudinal or transverse line, as the case may be, and receiving a transfer may, at his option, use the transfer at any point of intersection, or may not use it at all, but may, notwithstanding he has taken a transfer, continue on the line upon which he started to the end of the route, and he is not called upon to decide when demanding the transfer at what point he will use it, or whether he will use it at all. Under this system the only passenger likely to be inconvenienced, because he had not demanded a transfer upon commencing his journey, would be one who started without the intention of transferring, and then, during the trip, changed his mind. We see no reason to suppose that such cases would be at all numerous. We are, therefore, of the opinion that the regulation in question, considered with respect to the system of transfers now in operation, is reasonable and lawful. Of course, if the defendant should hereafter adopt a less liberal transfer system, as, for instance, requiring a passenger at the time of taking a transfer to irrevocably determine at what point he would transfer, or whether he would transfer at all to another line, a very different question as to the reasonableness of the rule now under consideration might be presented. The evidence shows that the rule has been posted conspicuously and advertised in such manner as to bring it to the notice of the traveling public generally. There is reason to believe that plaintiff knew of the existence of the rule and demanded a transfer in violation of it expressly to

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lay a foundation for this action, but whether he actually knew of the existence of the rule or not is immaterial, so long as it had been properly and reasonably advertised, as we think it had been. (*Barker v. Central Park, etc., R. R. Co., supra.*)

It follows that the judgment of the Appellate Term and of the Municipal Court must be reversed and a new trial granted, with costs in this court and in the courts below to appellant to abide the event.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

LAUGHLIN, J. (concurring):

I concur in the opinion of Mr. Justice SCOTT, but wish to specially emphasize some points and limit my views on others.

As this appeal is presented to us, the rule requiring that passengers desiring transfers shall demand the same at the time of paying their fares is reasonable. The defendant is issuing transfers, not for particular points or lines, but good at any point, and we are informed by the learned counsel for the defendant, who argued the appeal, that it accords to passengers the right to remain on the car on which a transfer has been obtained to the end of the line without using the transfer. It is quite likely that the defendant would have the right to limit the transfers to particular points or lines and require the passenger to elect at what point he wishes to transfer; and it is not at all clear that a passenger would have the right, against the will of the company and without paying another fare, to remain on the car on which he received a transfer after passing the connection for which the transfer was given, or the last transferring point on the line. If the company should assert either of these rights, then it may well be doubted whether this rule could be deemed reasonable. In the present circumstances, however, and while the transfers are unlimited as to the points at which they may be used, and while the company permits passengers after receiving transfers to remain on the car to the end of the line without using them, the rule requiring the passengers to elect on paying their fare whether or not they desire transfers, can work no injustice to the traveling public, at least not after the people understand that

they are entitled to demand a transfer and use it or not, as they like. The passenger may protect himself in all cases where there is a possibility that he may need a transfer by demanding one on paying his fare. Since the passengers may enjoy all of their rights under this rule, being at liberty to demand a transfer in all cases on paying their fare and to use it or not as they like, and it is deemed essential to the protection of the company against demands for more than one transfer by a single passenger, and demands for transfers by those who have not paid their fare, it should be upheld by the courts as reasonable.

Determination and judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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LOUIS LESE, Appellant, v. WILLIAM M. LAWSON, as Executor, etc.,  
of JACOB LAWSON, Deceased, Respondent.

First Department, March 15, 1907.

**Vendor and purchaser — specific performance — when tender by vendee not necessary.**

When a vendor has agreed to convey an unincumbered title and it is conceded that an inheritance tax which was a lien upon the property had not been paid, the vendee is entitled to equitable relief although he omitted to tender performance on his part, for under the circumstances tender would have been an idle ceremony.

This is true even though the parties be considered to have mutually abandoned the contract; under the circumstances the vendee in equity is entitled to recover the earnest money paid without tender of performance.

APPEAL by the plaintiff, Louis Lese, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 11th day of July, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits and directing that the notice of pendency of action herein be canceled of record.

*John D. Connolly*, for the appellant.

*James S. Larson*, for the respondent.

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SCOTT, J. :

Action by a vendee of real estate for specific performance. The plaintiff appeals from a judgment dismissing the complaint. The contract was made on March 1, 1905, and provided for a conveyance of the property free from incumbrance. The title was agreed to be closed on March 31, 1905, but the date of closing was adjourned to April twenty-fifth. In the meantime it had come to the knowledge of the vendee that the inheritance tax had not been adjusted and paid on the estate of defendant's testator, and there appears to have been some conversation between the attorneys for the parties relative to the tax and the time at which it could be paid, but their testimony does not agree as to what actually took place. On the adjourned day the defendant attended at the time and place fixed for closing the title, but he was not then in a position to comply with his contract because the inheritance tax still remained unpaid, and constituted an incumbrance upon the property. The plaintiff did not appear, very probably because he knew that the defendant could not make a conveyance free from incumbrance. Nothing was done by either party for some time, neither making a tender of performance to the other, so that neither put the other technically in default. Plaintiff's attorney says that he was waiting for the inheritance matter to be adjusted, and that vendor's attorney had promised to notify him when that had been accomplished. Vendor's attorney denies that he made any such promise, and he and his client appear to have ignored plaintiff and his attorney. In February, 1906, plaintiff, learning that defendant had contracted to sell the property to some one else, began this action.

We are of opinion that, in any view of the facts, the plaintiff was entitled to some relief in equity. The defendant never tendered performance, and plaintiff should not be denied all relief because he omitted to make a tender of performance which would, of necessity, have been futile because, upon the conceded facts, the vendor on the day fixed for closing the title could not perform. It would have been an idle ceremony to have gone to the appointed place and made a formal tender. Looking at the evidence from a point of view most favorable to the defendant, the utmost that can be said is that the parties by their acts mutually abandoned the contract, but even in this view the plaintiff is entitled to some relief. It

would be highly inequitable that defendant should be permitted to retain the money already paid down upon a contract of which he never tendered performance and which he could not have fulfilled if demand had been made upon him.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the result.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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SAMUEL F. B. MORSE, Appellant, v. THE STAR COMPANY,  
Respondent.

First Department, March 22, 1907.

**Libel — publication charging drunkenness — when libelous per se.**

An article charging that the plaintiff staggered into a police station claiming that he was poisoned and fell to the floor with a crash and that his wife stated that for the past three weeks he had been "celebrating," which article is stated by innuendo to accuse the plaintiff of drunkenness in a public place, etc., is libelous *per se* because it imputes drunkenness to the plaintiff which tends to degrade and render him odious, and also because it charges him with intoxication in a public place, which is a crime punishable by fine or imprisonment. Although "celebrating" is not defined by Webster as indulging in intoxicating liquors to excess, the word as used aforesaid may convey that idea.

APPEAL by the plaintiff, Samuel F. B. Morse, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 20th day of November, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the defendant's demurrer to the complaint.

*M. T. Corcoran*, for the appellant.

*Clarence J. Shearn*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for an alleged libelous publication, which is set out in the complaint. The innuendo



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charges that the article intended to accuse the plaintiff of drunkenness in the public street and in a public police station, and by reason of said drunkenness the plaintiff was rendered a physical and mental wreck, thereby destroying his reputation for sobriety and mental ability, to his damage in an amount named.

Defendant demurred to the complaint, upon the ground that the facts stated did not constitute a cause of action. The demurrer was sustained, the complaint dismissed, and plaintiff appeals.

The demurrer, of course, admits the truth of the allegations alleged, and also admits every inference that can be fairly and legitimately drawn from the words used in such allegations. The general rule of construction is that words are to be taken in the sense which is most obvious and natural, and according to the idea that they are calculated to convey to those to whom they are addressed. (18 Am. & Eng. Ency. of Law [2d ed.], 974.) Applying this rule to the words used in the complaint, I do not see how any meaning can be ascribed to them other than that the plaintiff was charged with being drunk on the occasion referred to. The words are: "A man who gave his name as Samuel F. B. Morse \* \* \* and whose office is at present at No. 49 Exchange Place, staggered into the Church Street police station last night and clinging for support to the desk at which sat Sergeant McAuley, gasped, 'I've been poisoned with strychnine. Send for a doctor quick. My name is Samuel F. B. Morse,' saying which the man fell to the floor with a crash. The sergeant sent a hurry call to the Hudson Street Hospital which brought Dr. Vance and an ambulance within a few minutes. The surgeon thought he saw symptoms of strychnine poisoning and applied a stomach pump. The use of the instrument disclosed evidences of alcohol. \* \* \* Dr. Vance would not take the patient to the hospital. After a rest the man left the station house. \* \* \* Mrs. Morse was seen last night at the address given by the supposed victim of poison. She scoffed at the idea that he had taken poison, but said with much feeling, 'I am not surprised that he said so. For the past three weeks he has been celebrating the patenting of a notable invention.'"

The learned justice sitting at Special Term thought the article was not libelous because it simply charged the plaintiff with cele-

brating and that such charge does not imply that the person is drunk, or has been indulging to excess in intoxicating liquors, and the definition of the word "celebrating" as given in Webster's dictionary is set forth to sustain this view.

The article as published does not charge the plaintiff with "celebrating," but does charge him with "staggering" into the police station, clinging to the sergeant's desk for support, and then falling to the floor with a crash. It is true it also contains what purports to be a statement by Mrs. Morse to the effect that the plaintiff had been "celebrating," but this is not the charge made against the plaintiff. Her statement, however, when taken in connection with the charge made, would naturally convey the idea that the plaintiff, at the time, was drunk and for sometime had been indulging to excess in intoxicating liquors. In my opinion the publication complained of is actionable *per se*, because it not only imputes to the plaintiff drunkenness, which tends to degrade and render him odious (*Holmes v. Jones*, 147 N. Y. 59; 18 Am. & Eng. Ency. of Law [2d ed.], 867; *Morgan v. Kennedy*, 62 Minn. 348), but it also charges him with being drunk in a public place, which is made a crime, punishable by fine or imprisonment or both. (Liquor Tax Law [Laws of 1896, chap. 112], § 40, as amd. by Laws of 1897, chap. 312.)

The judgment appealed from, therefore, must be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to withdraw its demurrer and answer on payment of the costs in this court and in the court below.

PATTERSON, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Judgment reversed, with costs, and demurrer overruled, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Order filed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GEORGE W. CURTISS, Appellant.

First Department, March 22, 1907.

**Crime — forgery in third degree — proof necessary to conviction — adjournment refused — charge.**

On the trial of an indictment for forgery in the third degree under section 515 of the Penal Code for willfully omitting to make true entries in account books with the intent to conceal a larceny, it is not necessary that the prosecution show that the defendant himself committed the larceny concealed by the false entry.

Evidence considered and judgment of conviction affirmed.

The granting of an adjournment of a trial in a criminal action is in the sound discretion of the judge which will not be interfered with unless injustice has been done. It is not reversible error to refuse to grant an adjournment by reason of the absence of one of the defendant's counsel when in fact a carefully prepared defense was made at trial.

It is not error to refuse to charge that the fact that the defendant did not flee from the scene of his crime may be considered by the jury. Such evidence is a self-serving declaration, not connected with the *res gesta*.

APPEAL by the defendant, George W. Curtiss, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 22d day of June, 1906, convicting the defendant of the crime of forgery in the third degree, and also from orders denying respectively the defendant's motions for a new trial and in arrest of judgment.

*Lorlys Elton Rogers*, for the appellant.

*E. Crosby Kindleberger*, for the respondent.

McLAUGHLIN, J. :

The defendant appeals from a judgment convicting him of the crime of forgery in the third degree, and from orders denying motions for a new trial and in arrest of judgment. The indictment under which the conviction was obtained was drawn under section 515 of the Penal Code, which provides, among other things, that a person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, willfully omits to make true entry in any material particular in any account

or book of accounts made, written or kept by him or under his direction, is guilty of forgery in the third degree. The indictment charged that the defendant, as the clerk of the New York Polyclinic Medical School and Hospital, kept for it a certain book known as the cash book, in which it was his duty to enter all of the receipts of the corporation; that the corporation at the time stated received a check amounting to fifty dollars, made by one Edward L. Kellogg, which it was the duty of the defendant to enter in such book, but notwithstanding that fact he, with intent to defraud and to conceal the larceny and misappropriation of the sum of fifty dollars in money of the corporation, willfully omitted to make a true entry of the receipt of such check.

At the trial it appeared that the defendant, at and for a long time prior to the time the forgery was alleged to have been committed, was the bookkeeper and cashier of the New York Polyclinic Medical School and Hospital, and as such practically had control over all the funds received by the institution. The general funds were deposited with the Knickerbocker Trust Company in what was known as "Account A." At various times donations for paying certain mortgage bonds of the institution were received, and these the defendant was instructed to deposit in a special account known as "Account C" and make an entry of the same in a book known as the "Secretary's Private Memorandum Book." The accountants employed to audit quarterly the books of the institution knew nothing of the existence of Account C or the secretary's memorandum book, and had always found the general accounts correct. In June, 1905, while the defendant was away on his vacation, a special accountant was employed to go over the books, and while he found the balance at the end of every three months was, to all appearances, invariably correct, he discovered that during the intervals between the audits there were certain irregularities which excited his suspicion and led to the further discovery that checks had been deposited in Account A from time to time without being entered in the cash book, so that while the books apparently balanced, there was really a considerable shortage. Further investigation disclosed the fact that Account C was several thousand dollars short and that the defendant, upon receiving checks for such account, had apparently entered them in a private memo-

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random book without, however, entering the date of their receipt and then deposited them in the general account, that is, Account A, making no entry thereof in the cash book, and abstracting an equal amount from the cash on hand, so that the books balanced at the end of each quarter, excepting, of course, Account C, the existence of which, as above stated, was unknown to the regular auditors.

The evidence established beyond a doubt that the defendant failed to make an entry of the check as charged in the indictment, and the only thing that remains to be considered is whether there was evidence sufficient to justify the verdict that such failure was willful and that defendant's intent in omitting to make such entry was to defraud and to conceal a larceny or misappropriation of property. The evidence on the part of the People fairly tended to establish that the defendant had sole charge of the books of the institution; that he not only failed to enter the check specified in the indictment, but at least nine other checks; that a shortage amounting to several thousand dollars existed in his accounts, of which no explanation was given or attempted; that the defendant, in the presence of his wife, after he had been asked to make an explanation of the shortage and had failed to do so, admitted that before going away on his vacation he had taken \$175 of the hospital's money out of the cash drawer without authority and without the knowledge of any person connected with the institution, which sum he said he intended to repay on his return.

It also appeared that the defendant, some twelve years before, had been convicted of stealing \$5,000 from his employers, and although considerable testimony was given to show his reputation for good character since that time, nevertheless it is difficult to see how, if effect is to be given to evidence, the jury could have reached any other conclusion than that the defendant's failure to enter the check in question was willful and with intent to conceal a larceny or misappropriation of the amount of it. It is true there is no evidence to show that this particular omission was to conceal a particular larceny, nor any direct evidence that the defendant had taken the money; but this was unnecessary, for the section of the Penal Code refers only to *any* larceny or misappropriation by *any* person; and while the undisputed facts must irresistibly lead to the conclusion that the defendant himself was guilty of the larceny, it was incum-

bent upon the prosecution to prove simply that there had been a misappropriation and that the defendant's failure to enter the check was with the intention of concealing the same. The evidence, as it seems to me, not only justified, but required the jury to reach the conclusion which it did.

Nor do I think any errors were committed at the trial which would justify a reversal. The refusal to grant an adjournment of the trial certainly, upon the facts set forth, was not error. This was a matter resting in the sound discretion of the trial judge, and such discretion will not be interfered with unless it appears that injustice was done. (*McCready v. Lindenborn*, 37 App. Div. 425; *affd.*, 165 N. Y. 630; *Webster v. People*, 92 *id.* 422; *People v. Jackson*, 111 *id.* 362.) It does not here appear that injustice was done the defendant. Though one of the attorneys retained by the defendant was absent and the other claimed to be unprepared, his own affidavit stated that they were to try the case together and had been ready for trial several times, except for the inspection of the books which the defendant claimed had been promised him, but never actually permitted. The date for the trial had been fixed by the court the week before, with all the facts before it, the attorney for the defendant at that time having presented the same reasons for delay. Nor is there any indication in the record that the attorney who did actually conduct the case for the defendant was unprepared; on the contrary, the manner in which the case was tried shows a carefully prepared defense.

As regards the inspection of the books, though there is conflicting testimony, it is apparent ample opportunity was offered the defendant, and in the light of the evidence it is hardly conceivable that an examination by the accountant selected by him would have altered the situation. Indeed, this accountant examined the cash book while on the witness stand and could find no entry of the check in question.

Nor were the exceptions to the charge well taken. The court stated fully and correctly the force of evidence of good character and the effect to be given to it. The request to charge "that the fact that the defendant remained in the city of New York during the months while this accusation was pending against him may be considered by the jury," was denied and properly so. A defend-

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ant, except under peculiar circumstances, cannot be permitted to show that he did not become a fugitive from justice when accused or suspected of having committed a crime. Such evidence is a self-serving declaration (Underh. Crim. Ev. 151; Whart. Crim. Ev. § 752; *People v. Rathbun*, 21 Wend. 509; *Gardiner v. People*, 6 Park. Cr. Rep. 155; *Commonwealth v. Hersey*, 2 Allen, 173; *People v. Shaw*, 111 Cal. 171) not connected with the *res gestæ* and, therefore, inadmissible. There is a clear distinction between evidence of flight, which tends to show the consciousness of guilt, and contrary evidence which might show a clever attempt to avoid the consequences of the crime by assuming the appearance of innocence. It is true there are expressions in the opinion delivered in *People v. Childs* (90 App. Div. 58) to the effect that such evidence is admissible, but what was there said was with reference to the peculiar facts in that case and the doctrine will not be extended, and besides it has no application to the facts in the case now under consideration.

I am satisfied, after a careful consideration of this record, that the defendant had a fair trial; that the evidence sustained the verdict of the jury, and that no error was committed which would justify a reversal.

The judgment of conviction and the orders appealed from, therefore, are affirmed.

INGRAHAM and CLARKE, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., concurred in result.

Judgment and orders affirmed. Order filed.

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PERCY N. FURBER, Appellant, v. NATIONAL METAL COMPANY,  
Respondent.

First Department, March 22, 1907.

**Bailment**—action to recover pledged stock—notice of sale by bailee withdrawn—second notice of sale necessary—facts showing fraud.

A bailee who, after notice that he intends to sell pledged stock, waives his right and gives further time to the pledgor cannot recall his waiver without further notice to enable the pledgor to protect the pledge.

When under such circumstances the bailee sells without second notice the pledgor is entitled to recover the stock, and there is no necessity that he keep a tender of payment alive by paying the money into court.

The plaintiff pledged certain shares of mining stock with the defendant corporation as security for the payment of a demand promissory note. He left this State to meet the president of the corporation at the mines in Mexico where a serious emergency had arisen. The treasurer of the company, knowing of the plaintiff's departure on the corporate business, sent a note to his New York office stating that the stock would be sold on a date stated. The plaintiff being telegraphed by his office of the contemplated action, told the president of the company that he would leave immediately for New York in order to protect his stock, but was induced not to do so on the plea that his presence was necessary at the mines. He was promised an extension of time for payment, but the period was left indefinite. Subsequently during his absence the plaintiff's stock was sold without further notice. On all the evidence,

*Held*, that a clear case of unfair dealing was presented and that under the rules aforesaid the plaintiff was entitled to recover the stock.

APPEAL by the plaintiff, Percy N. Furber, from so much of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of May, 1906, upon the verdict of a jury, rendered by direction of the court, as fails to award to the plaintiff the possession of certain shares of stock.

*Arthur Furber*, for the appellant.

*Charles Blandy* of counsel [*De Grove & Riker*, attorneys], for the respondent.

CLARKE, J. :

The action was brought to recover the possession of 500 shares of the capital stock of the Oil Fields of Mexico Company and of 10,000 shares of the capital stock of the Vacas San Marcos Mining and Milling Company, deposited by the plaintiff with the defendant as collateral security for the payment of plaintiff's demand promissory note, and in case possession could not be had for damages.

At the close of the case the learned trial court directed a verdict in favor of the plaintiff upon which a judgment was entered, which "Ordered and adjudged that the plaintiff is awarded possession of 10,000 shares of Vacas San Marcos Mining and Milling Company



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of the par value of one dollar per share, and for the sum of \$302.77, together with the sum of \$243.20 costs as taxed, making in all the sum of \$545.97, and that he have execution therefor." The plaintiff appeals from so much of the judgment as fails to award possession of 500 shares of the Oil Fields of Mexico Company and in lieu thereof awards the sum of \$302.77. -

The defendant is a corporation created and existing under the laws of the State of New Jersey. One C. B. Lewis, an old and intimate friend of the plaintiff, was the president of the defendant and W. B. Lewis, his brother, was its treasurer. The defendant corporation was the owner of about 250,000 shares of the Vacas San Marcos Mining and Milling Company and C. B. Lewis and plaintiff were two of the three directors of said company. The properties of said mining company were located in Mexico. The defendant held the plaintiff's collateral stock demand note upon which \$1,154.15 was unpaid and to secure which it held as collateral 500 shares of the capital stock of the Oil Fields of Mexico Company, of the par value of \$100 per share, and 10,000 shares of the capital stock of the Vacas San Marcos Mining and Milling Company of the par value of \$1 per share.

This being the relation of the parties, on the 9th day of March, 1904, the plaintiff left New York for the mines in Mexico, having theretofore promised to meet C. B. Lewis and the other director there, a serious emergency having arisen in connection with said property. Up to the time the plaintiff left New York no notice had been given of any intention to sell his stock, held as hereinbefore set forth, as collateral. The treasurer of the defendant, W. B. Lewis, knew of the plaintiff's departure from New York, he knew that he had started for Mexico to meet his brother, C. B. Lewis, the president of the defendant, on the business of the mining company, of whose stock the defendant held 250,000 shares. With this knowledge he sent a notice to the plaintiff's office in New York that his stock would be sold at auction on March twenty-third. The plaintiff and C. B. Lewis met in Torreon, Mexico, and reached the mines at eight o'clock on the night of the fifteenth of March. On the seventeenth of March plaintiff received a telegram which had been brought in by wagon eighteen miles from the nearest telegraph station, from one Westcott, who shared his New York office, dated

March sixteenth: "National Metal Company advise will sell at auction Vacas and Oil Stock, 23d." Plaintiff showed Lewis the telegram and asked its meaning. Lewis replied: "Well, I can't help that." Plaintiff stopped the coach, which was about returning, and said: "Very well, \* \* \* if you cannot help it I am going to leave immediately." Plaintiff testified that if he had left on that night he would have reached New York by or before the twenty-third day of March. Lewis said: "You can't leave; we need you here. \* \* \* It is important that you should remain here for the conference in reference to title, etc." Plaintiff said to Lewis: "I am not going to stay and have my stock sacrificed for the benefit of the Vacas." Lewis said: "What do you want me to do?" Plaintiff replied: "I want you to have that stopped at once." Lewis said: "Well, all right; very well," and thereupon sent a telegram to W. B. Lewis. The telegram was as follows: "March 17, 1904, \* \* \* Please defer sale Furber stock pending receipt my to-day's letter." Plaintiff and Lewis stayed at the mine and were constantly engaged in the business of the Vacas Company until the twenty-first of March, and from there went to Durango, and then to Torreon by coach and rail. During the trip on the railroad, Lewis asked Furber: "How long do you want this thing to remain open?" and plaintiff said: "You know I am going down to the Oil Fields, and I cannot possibly be back under six or seven weeks; it may even take me three months." Lewis said: "I know we cannot give you three months." Plaintiff said: "All right, Lewis, if you cannot give me three months, arrange to give me just as long as you can. You know the struggle I am having on this deal, and I don't want you to press me quicker than you should for that." Lewis said: "All right." In another account of the conversation, on cross-examination, plaintiff put it in this way: "I said I wanted a delay until I was able to return to the States from Mexico some two months, and he replied in substance that he could not say that so long a delay could be had, and nothing further was said fixing any length of time for the delay of the sale except he was to telegraph me. \* \* \* He knew where I was. What was said on that subject (was) I said: 'Very well, Mr. Lewis, if you cannot get me the two months, why get me as long as you can and let me know.' He said: 'Very well, I will do

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so.'” On the eighth day of April, plaintiff, then being at Mexico City, received a letter from the defendant, dated April first, containing a statement showing that the oil stock had been sold for \$1,500, and the Vacas stock had been bought in for \$5 on March thirtieth, and that there was a balance to his credit of \$244.17, and that the company held at his disposal said amount and the Vacas stock. He had received no notice that the sale had been postponed to March thirtieth and received no notice or communication of any kind from the day that he left Lewis up to the receipt of this letter. He immediately wrote to the company repudiating the sale, stating: “I shall be prepared upon my return to New York to carry out my side of the agreement and demand from you the delivery of my collateral.” In August he returned to New York and on the fifteenth tendered the amount due, with interest, and demanded the note and the collateral, which was refused.

Two days after Lewis sent the telegram of the seventeenth of March he wrote a letter to his brother, the treasurer of the company, which plaintiff never saw, in which C. B. Lewis said, after stating that Furber had shown the telegram, “He asked me to intervene, and I replied that I could not do so, as the matter was in the hands of our directors, whereupon he replied that in such an event he would be obliged to leave here immediately and go straight to New York. We are up against a situation here which looks somewhat serious. The ore has pinched out at the bottom of the lowest level, and while the outlook is by no means discouraging, it is at least disappointing. We need Mr. Furber’s presence here until we have thoroughly analyzed the situation and decided upon our future policy, and it would have been very unfortunate had he left here, as he suggested. Of course, it might have been simply a bluff statement upon his part, but undoubtedly he regards the matter as a very serious one, as presumably the sale of any of the stock we hold as collateral belonging to him at auction, would prove a very serious blow to him. Under the circumstances I could do nothing else than to telegraph you, asking you to defer any action until you received this letter. \* \* \* On Tuesday we shall finish up with the important business we have there, and then Mr. Furber will be free to go back to New York instead of going down to his oil fields, as he purposes. I shall then inform him that

I cannot intervene to any further extent, and that he must fix up his remaining obligations to prevent sale of the stock. I do not anticipate that this delay of say a week in your announced intention to sell his collateral will prejudice ourselves any to enable him to get over the somewhat difficult situation here. He informed me some days ago that he intended to be absent at his oil fields about two months, and I shall of course tell him plainly that if his plans involve a delay of two months upon our part for the sale of his collateral, his absence from New York is entirely out of the question, and that I cannot ask you to delay taking any action looking to the sale of his collateral longer than March 31st."

C. B. Lewis testified: "I did not give personally to Mr. Furber any writing or verbally any statement of the date to which the sale of these securities had been postponed." Although he had a conversation with him after the letter of the nineteenth, he said: "I did not state to Mr. Furber what length of time I was going to have the sale postponed. At the time I had this conversation I knew what my request had been to my brother. \* \* \* I did not tell Mr. Furber what I had written to my brother."

This evidence presents a clear case of unfair dealing; the notice sent to the New York office, when the treasurer knew that plaintiff was in Mexico, the president's preventing plaintiff's return to New York in time for the sale because of the necessity for his presence in Mexico; the sending of a telegram which was shown to plaintiff, directing the sale to be deferred; the writing of a letter two days after fully showing the need of plaintiff's presence in Mexico and telling the treasurer, his brother, that he could not ask him to delay the sale further than the thirty-first; not communicating the contents of this letter to plaintiff; using him for his own purposes, and inferentially for the benefit of defendant, until the necessity had ceased; permitting him to go on to attend to his own affairs without a suggestion of the limit put upon the delay; Lewis' return to New York and presence at the sale on the thirtieth and permitting it to proceed when he knew that plaintiff was still in Mexico without any notice whatever of the sacrifice of his interests: these facts, about which there is no dispute in the evidence, present a simple story of double dealing that ought not to succeed.

In *Toplitz v. Bauer* (161 N. Y. 325) Judge O'BRIEN said:

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"The contract of bailment, whereby personal property is deposited or pledged as security for a debt, creates duties and relations peculiar to itself. These duties and relations are governed more by the general maxims of equity than by the strict rules of the common law. \* \* \* The pledgee doubtless has the right to exact strict performance of the contract according to its terms, and, upon default in the payment of the debt at the time stipulated, he may, under a contract like this, dispose of the pledge. But if he waives the right to exact strict performance, and gives time and indulgence to the debtor, he cannot recall this waiver at his own option without notice to the pledgor, to the end that the latter may have an opportunity of protecting the pledge. The good faith which the law exacts from a person dealing with trust property will not permit the pledgee, after having once waived the forfeiture or the right to dispose of the pledge upon default of payment at the prescribed time, to suddenly stop short and insist upon the forfeiture for the non-payment of the debt when the other party is unprepared to redeem. Strict performance in such cases may be waived by any agreement, declaration or course of conduct on the part of the pledgee which leads the owner to believe that a forfeiture will not be insisted upon without an opportunity given him to redeem, \* \* \* and no new or independent consideration is required to support a waiver of a condition in a contract requiring payment to be made upon a date designated. \* \* \* In all the elementary books on the law of bailments, which deal at length with that form of the contract known as pledge, it is stated that whenever the owner is entitled to notice, and a disposition of the pledge is made without such notice, it amounts to a conversion of the property so pledged, and, doubtless, that is the general rule."

That case was followed by *Bailey v. American Deposit & Loan Co.* (52 App. Div. 402), unanimously affirmed in 165 New York, 672, on the opinion of INGRAHAM, J., who said: "Here was an indefinite extension of the time to make the payment which, if made, would have been a valid extension of the note for another year. During this indefinite time, however, when such payment was to be made, and a new contract for another year closed, the defendant had waived its right to resort to the forfeiture contained in the original note, and to surrender the policy of insurance without notice. It

would not, I think, be claimed that the defendant, the day after writing the letter, would have been justified in surrendering the policy and enforcing the forfeiture without notice to the obligors. If not on the next day, on just what day would the right of the defendant to enforce this forfeiture accrue? \* \* \* If defendant had waived its right to thus forfeit the pledge without notice, such a forfeiture was a conversion of the policy for which the defendant would be liable."

In *Hastings v. Brooklyn Life Ins. Co.* (138 N. Y. 473) the Court of Appeals said that the president or other general officer of the corporation has power *prima facie* to do any act which the board of directors could authorize or ratify. In the case at bar it seems to me that, irrespective of the act of the president, his talks with the plaintiff in Mexico and his telegram there shown, the act of the company itself in postponing the sale was the granting of an indulgence by it, and, inasmuch as it had given notice of the sale on the twenty-third, to make a sale on any other day valid, notice of that postponed sale must have been given. Every instinct of equity and fair dealing condemns the transaction as outlined in this record.

In *Cass v. Higebotam* (100 N. Y. 248) Judge MILLER said: "The evidence upon the trial established the fact that the diamonds held by the plaintiff were pledged to him by the defendant as security for the payment of the promissory note in suit. The plaintiff, therefore, was a bailee of the same and only had the right to retain them until his debt was paid. Upon payment being made he was bound to return the goods, and upon refusal to do so, became liable to the bailor in replevin or in an action of trover or assumpsit. \* \* \* The tender here was made after the suit was brought and included the principal and interest of the debt and the costs of the action as far as it had proceeded. Being a conditional tender, and depending upon the return of the property, which was demanded, there would seem to be no obligation on the part of the defendant to pay the money into court. \* \* \* It follows that it was not necessary to bring the money into court to make the tender valid, and if the defendant had title to the property the lien of the plaintiff on the same was discharged and he became liable to the plaintiff for the goods or the value thereof. \* \* \* Unless the refusal to return the property was justified, there was clearly a

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conversion of the same by the plaintiff, and the defendant had a right of action for the recovery of the value thereof or of the property itself."

In *Barnett v. Selling* (70 N. Y. 492) it was said: "That replevin, as a substitute for the action of detinue, now obsolete, will lie although the defendant has parted with the possession of the property and the same is beyond the reach of the process of the court, so that in no event can a return of the property be had either in virtue of the 'claim and demand' of the plaintiff or any judgment that may be given in the action. (*Nichols v. Michael*, 23 N. Y. 264.)"

In *Sinnott v. Feiock* (165 N. Y. 444) Judge CULLEN, reviewing the cases, including *Nichols v. Michael* and *Barnett v. Selling*, (*supra*), states that the doctrine has been steadily adhered to by the Court of Appeals that where a person is in possession of goods belonging to another which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue, and that the action of replevin will lie where the defendant has voluntarily parted with the property.

Upon the facts presented upon this record the defendant waived its right to sell the stock deposited as collateral at the time and under the circumstances under which the sale took place without notice thereof to the plaintiff. Under the cases cited the action lies. The defendant having voluntarily and wrongfully parted with the possession of the stock, there was no necessity for keeping the tender alive by a payment into court of the money due on the original note; therefore, the court erred in the direction of the verdict.

It follows that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and SCOTT, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

In the Matter of Acquiring Title by THE CITY OF NEW YORK, Appellant, to Certain Lands and Premises Situated on the Westerly Side of Avenue A or Sutton Place, on the Northerly Side of Fifty-ninth Street, on the Southerly Side of Sixtieth Street Between Avenue A or Sutton Place and First Avenue, in the Borough of Manhattan, in the City of New York, Duly Selected with Other Property as a Site for the Blackwell's Island Bridge.

DAVID SHAPIRO and Others, Respondents.

First Department, March 22, 1907.

**Eminent domain — appraisal of lands on condemnation — erroneous valuation — evidence of value.**

The award of commissioners of estimate and appraisal for lands taken by the city of New York by eminent domain considered and confirmation refused.

On the appraisal of such land it is error to exclude evidence of the actual rents received upon the question of value. The rental of improved realty is relevant on the question of fee value.

It is error to consider evidence of what unimproved property would earn if apartment houses were built thereon, as it involves elements of uncertainty and speculation.

On the question of value it may be shown how much the market value of a lot is enhanced by a building thereon, but evidence of the structural cost of the building is not competent.

It is error to allow expert witnesses upon redirect examination to testify in regard to sale of pieces of property about which they had not been interrogated on cross-examination.

APPEAL by the petitioner, The City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of November, 1906, confirming the report of the commissioners of estimate and appraisal in condemnation proceedings.

*Theodore Connolly* [*Charles N. Harris* and *Thomas F. Noonan* with him on the brief] and *William B. Ellison, Corporation Counsel*, for the appellant.

*Albert I. Sire*, for the respondents Shapiro and Carstens.

*Walter B. Hopping*, for the respondents Wendel and others.

*Truman H. Baldwin*, for the respondent Hyslop.



CLARKE, J. :

This is an appeal by the city from an order of the Special Term confirming the report of the commissioners of estimate and appraisal of land taken by the city on Fifty-ninth and Sixtieth streets, between Avenue A and First avenue, as a site for the approach for the Blackwell's Island bridge.

Notice of the intention to apply for the appointment of commissioners of estimate and appraisal was dated on February 10, 1905, and the order of appointment was made and entered on the 27th day of April, 1905. The title to the property taken vested in the city on the 9th day of September, 1905. On the 23d day of February, 1905, the city purchased No. 48 Avenue A, being parcel 25 on the commissioners' map, being a lot 27.16 feet frontage by 80 feet in depth, on which was a four-story brick apartment house, for \$21,500. For No. 46 Avenue A, parcel No. 24, 27.15 feet frontage, 80 feet deep, upon which there was a building in all respects identical with No. 48, the two possessing a party wall in common, the commissioners allowed \$30,209.20. For No. 50 Avenue A, parcel 23, immediately to the north of parcel 25, a lot 27.66 feet by 106 feet 5 inches deep, upon which was a building identical with that on the lots Nos. 46 and 48, the commissioners allowed \$33,354.46. No. 52 Avenue A, parcel 27, 25.10 feet frontage, 106 feet 5 inches deep, upon which was a five-story brick building 51 feet deep and a three-story frame building in the rear 25 feet by 24 feet, the city purchased on February 1, 1905, for \$23,500. For No. 54 Avenue A, 29 feet frontage, 80 feet deep, with a five-story brick building thereon, the commissioners allowed \$32,422.37. No. 44 Avenue A, 20.5 frontage, 80 feet deep, with four-story brick building the city bought on February 14, 1905, for \$16,000. For the lot immediately south of that, No. 42 Avenue A, parcel 22, 23.02 feet frontage, 80 feet in depth, with four-story brick building, the commissioners allowed \$40,000. Immediately adjacent to said property but facing on Fifty-ninth street, No. 439, parcel No. 21, with 26 feet frontage, 97.04 feet in depth, with a four-story brick building with an extension, the city purchased on the 24th day of March, 1905, for \$22,500. No. 437 East Fifty-ninth street, immediately adjacent thereto to the west, No. 20 on the map, 19.05 by 100.42 feet in depth, five-story

brick, the commissioners allowed \$23,866.55. For the next three lots, 431, 433, 435 East Fifty-ninth street, all held in one ownership and each containing a five-story brick building, the commissioners allowed \$99,206.15. Parcel No. 31 consists of a vacant lot facing on Sixtieth street, 100 feet by 100.40 feet. This property was bought by the owner on March 11, 1905, for \$46,000. The commissioners allowed \$65,000, that is an increase in value of this unimproved lot on East Sixtieth street of \$19,000 in six months.

The comparison of the amounts awarded by the commissioners with the amounts paid in these five actual transactions out of a total of thirteen parcels, demonstrates that in allowing these excessive increases in the estimated value over the actual transactions, the commissioners must have proceeded upon some erroneous theory. An examination of the record discloses certain fundamental errors, the commission of which must have brought about the extraordinary result arrived at.

Testimony of the owners in regard to the actual rent received for several years prior to the vesting of title in the city, of 46, 50 and 56 Avenue A was excluded by the commissioners over the objection and exception of the city. The actual rents received are evidence of the rental value. The rental value of improved real property is relevant on the question of fee value. (*Jamieson v. Kings County Elev. R. Co.*, 147 N. Y. 322.) Actual rents given and received within the time proper to be considered were competent. (*Gallagher v. Kingston Water Co.*, 25 App. Div. 82; *Cook v. N. Y. El. R. R. Co.*, 144 N. Y. 117.)

In *Ettlinger v. Weil* (184 N. Y. 179) the court said: "Rental value tends to prove fee value, because other things being equal, the income from property is a measure of its market value. Rental value is capable of exact determination."

In regard to the vacant lots, parcel No. 31, a witness was asked what would be the best use to which these lots could be put; he replied: The erection of "three apartment houses, \* \* \* making each building about 33 feet." He was then allowed to testify, over objections and exceptions, that the cost of constructing three such buildings would be \$75,000, and that the rental value of such buildings would be between \$14,000 and \$15,000 a year. This was clear error. It involved so much of the elements of uncertainty and speculation as to be inadmissible as proof of any fact. As said.

in the case of *Tallman v. Met. El. R. R. Co.* (121 N. Y. 119): "There can be no certainty that the plaintiff would ever have erected dwelling houses upon the lots, and there could be no certainty as to the rents which could have been obtained from them either with or without the railroad in the street." (See *Woolsey v. N. Y. El. R. R. Co.*, 134 N. Y. 327.)

The same kind of evidence was erroneously admitted in regard to parcel No. 22, where the witness was allowed to testify that he would build up the vacant space west of the building, which is now the yard, with a four-story building, to conform with the structure there now, with a store on the first floor, and change the front of the building; that the cost of such addition would be from \$2,500 to \$2,700, and that with such improvements the rental value of the building would be \$3,500 to \$4,000 a year.

In regard to a number of the parcels the commissioners erroneously allowed testimony as to the structural value of the buildings. I understand the rule is that a witness may testify as to the market value of a lot of land and the market value of the lot with the building thereon standing. In other words, testimony as to how much the market value of the lot is enhanced by the building standing thereon. What the structural value of the building is is not competent. A man may purchase a piece of wild land far off from any railroad connection and thereon may build a magnificent structure. No development may take place in the neighborhood, and there may be no demand of any kind for the property. In considering the market value of the real estate under such circumstances, it would be obvious that what it had cost to put the building there could in no way affect the market value of the property as a whole.

In *Village of St. Johnsville v. Smith* (184 N. Y. 341) the court said: "In holding as we do that the appellant is entitled to have the improvements made upon his land by the respondent while a trespasser taken into consideration in ascertaining his compensation, it must be distinctly understood that the measure of such compensation is neither the cost of the improvements nor their value, or the value of their use to the village. The true inquiry is, how much do the improvements placed upon the property enhance the value of the appellant's land?"

The commissioners also erred in allowing expert witnesses upon

redirect examination to testify in regard to the sale of pieces of property about which they had not been interrogated on cross-examination. (*Robinson v. N. Y. El. R. R. Co.*, 175 N. Y. 219.)

Realizing as we do that the commissioners of estimate and appraisal constitute a somewhat unique tribunal with the power to take evidence and with the right and duty to themselves view the premises and from such view form an independent judgment, we should hesitate to interfere with their award for any one or perhaps all of the errors pointed out. It is also the rule that the amount of the commissioners' award for damages is rarely interfered with by the court. But when we find, as we do in the matter now at bar, such considerable discrepancies between fact and estimate and find so many errors in the admission and the exclusion of evidence, we are satisfied that the awards must have been affected by the matter erroneously admitted and reach the conclusion that the award ought not to stand.

The order appealed from is, therefore, reversed and the proceeding sent back to new commissioners to be appointed.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Order reversed and proceeding remitted as stated in opinion. Settle order on notice.

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CHARLES F. MULLER and WILLIAM H. HEBERTON, as Executors of and Trustees under the Last Will and Testament of THOMAS W. EVANS, Deceased, Appellants, v. THE CITY OF PHILADELPHIA, THOMAS W. EVANS MUSEUM AND INSTITUTE SOCIETY and Others, Respondents, Impleaded with ARTHUR E. VALOIS, as Executor of and Trustee under the Last Will and Testament of THOMAS W. EVANS, Deceased, Appellant, and ARTHUR B. HUEY and Others, Defendants.

First Department, March 22, 1907.

**Discovery of books and papers — when court has jurisdiction to require testamentary trustees to exhibit their accounts.**

When trustees and executors holding property in this State and in foreign jurisdictions bring an action in the courts of this State asking a construction of the will and a compromise agreement made by the devisees, and pray for leave

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to sell real estate upon the ground that the sale is necessary for a proper distribution under the will, the court has jurisdiction to compel them to allow a discovery and inspection of the records of the estate on a motion of interested parties, in order that the exact situation may be made clear.

The inspection may include an inspection of the books and papers in foreign countries pertaining to the estate.

SEPARATE APPEALS by the plaintiffs, Charles F. Muller and another, as executors, etc., and by the defendant Arthur E. Valois, as executor, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of October, 1906, granting to the defendant Thomas W. Evans Museum and Institute Society a discovery and inspection of certain books, records, etc., of the estate of Thomas W. Evans, deceased.

*Wolcott G. Lane*, for the plaintiffs, appellants.

*William L. Turner*, for the appellant Valois.

*Charles H. Tuttle*, for the respondent Thomas W. Evans Museum and Institute Society.

*John B. Doyle*, for the respondent City of Philadelphia.

*J. Noble Hayes*, for the respondents Anna F. Miller and others.

*Charles A. Conlon*, for the respondents W. W. Evans and others.

CLARKE, J. :

This is an appeal by the executors and trustees under the last will and testament of Thomas W. Evans, deceased, from an order of the Special Term requiring them to give a discovery and inspection of the books, inventories and records of their trust estate. Certain of the executors and trustees brought this action in the Supreme Court of this State, making one of their coexecutors and trustees a party defendant, and all parties interested in the estate of the decedent parties to the action.

The complaint alleges that the testator died on or about the 14th day of November, 1897, in the city of Paris, France, leaving a last will and testament, which has been admitted to probate in this State; that the decedent owned, at the time of his death, real

estate and personal property situated within this State. The complaint alleges the making of a compromise agreement which provided for the payment of \$800,000 to the heirs and next of kin; that the said sum of \$800,000 and counsel fees, commissions, claims and debts should be paid and the balance of funds remaining be paid over to the executors in Pennsylvania to be there distributed, under order of the court, according to law and in conformity with the provisions of said last will. It alleges the payment of \$100,000 under the said compromise agreement and that after making the said payment, and before the executors under the French jurisdiction were able to sell the real estate in the city of Paris, as provided for in said will and by the said compromise agreement, for the purpose of paying with the proceeds of said sale the legacies in said will and the \$700,000 balance provided to be paid by the compromise agreement, legal proceedings were taken in Paris by one John Henry Evans, which legal proceedings are still pending, and by reason thereof the executors were unable to sell the bulk of the real estate in Paris. It is alleged that without using the property or proceeds from the sale thereof and the assets of the estate within and under the jurisdiction of France and of the State of New York there is not sufficient property in the estate to construct the monument provided for in the will, to discharge the legacies and to pay the sum of \$700,000 under the compromise agreement; that under the existing conditions of the estate the provisions of the 16th article of the will, for the building of a museum and the establishment of an institute, cannot be carried out, excepting from money derived from the sale of the lands in New York city or the city of Paris; that the legatees under the will are demanding the payment of their pecuniary legacies and claim that said legacies are charged upon the real estate of the testator in this jurisdiction by the said will, and the parties of the second part under the compromise agreement are demanding and insisting upon the sale of said real estate in the city of New York for the payment of the said \$700,000 remaining to be paid, which, by the terms of the said agreement, they claim can be paid them from moneys which may be realized from the estate of the testator either in Europe or in America, and the plaintiffs allege that they are advised by their counsel that the real estate in the State of New York devised in trust for edu-

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ational, charitable or benevolent purposes should not be alienated by the trustees unless specifically authorized by the will so to do, except upon application to the Supreme Court and under its direction and supervision. A copy of the will is attached to the complaint and there does not seem to be contained therein a special power of sale of the real estate situated in this State. The plaintiffs further allege that they have doubts as to the true meaning and intent of the provisions of said will and as to the particular course which the executors and trustees ought to pursue to carry out the intentions of the testator, and as to the true meaning and intent of the provisions of said compromise agreement in its relation to the said will and the proper course which the executors and trustees ought to pursue to legally, justly and equitably carry out the provisions of said agreement in its relation to said will so that the administration of said will may duly proceed; that the doubts and difficulties aforesaid relate especially to the real estate in the city of New-York, the control, management and sale thereof and disposition of the proceeds when sold, and they ask to be instructed by the court as to their rights and duties under the will and compromise agreement and that a sale of said real estate or any part thereof, under the directions of the court, may be ordered if the court adjudge it beneficial and proper for the estate that such sale be made, and that the rights and interests of the respective parties defendant herein in their relations to the said real estate be determined by the court and for all other relief, just and equitable, necessary and proper to protect the executors and trustees in the performance of their trust.

It thus appears that the trustees and executors, who by this appeal complain that they ought not to be called upon by the Supreme Court of this State to explain to their *cestuis que trustent* their doings with their trust estate, have themselves sought the jurisdiction of this court having made all parties interested parties to the proceeding. They have brought the will and the compromise agreement into court and have prayed the instructions of the court in regard to the proper interpretation of each of these instruments. They have asked for the authority of the court for the sale of the real estate upon the ground that if said real estate be not sold they will not have in their hands money sufficient to perform their duties

of distribution under the will or to carry out their own compromise agreement. It further appears that this court, by its decision reported in 113 Appellate Division, 92, allowed the answer of the defendant museum and institute society to be amended, which amended answer put in issue the validity of the compromise agreement, the interpretation of which is requested by the plaintiffs, and which answer demanded a full accounting from the executors and trustees and the turning over of the proceeds found due on such accounting to the institute.

It is evident that it would be impossible for the court, whose jurisdiction the executors and trustees have sought, to properly advise them as to the disposition of the real estate, which can only be sold by order of the court, without being advised of the general situation of the estate, because, if the amount necessary to build the monument and to pay the legacies and the amount due under the agreement can be obtained from the personalty, it ought so to be obtained in the first instance.

This court has jurisdiction because the executors and trustees have sought its aid and because all the interested parties are before it. It has jurisdiction because in order to authorize the sale of the real estate here situate, the exact situation of the whole estate is necessary for a determination. Executors and trustees under a last will and testament hold, perhaps, the highest fiduciary relation known to the law. They owe to the court and to their *cestuis que trustent* the utmost frankness of explanation of their dealings with their trust estate. When they come asking advice and aid in the performance of their trust, the court can view with little patience obstacles interposed by them to prevent a full disclosure of the facts.

It may well be that by reason of the diverse legal proceedings in the courts of three jurisdictions these plaintiffs are not responsible for all of the delay in the settlement of this estate and the carrying out of the last wishes of the testator, and we do not consider or pass upon any other matter than the one immediately before us. That matter is the interpretation of the will and the compromise agreement, and whether the court should authorize the sale of the New York real estate. For that decision a full disclosure of the condition of the estate and the conduct of the trustees in its management is material and necessary.



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Under such circumstances the order appealed from was proper to put the *cestuis que trustent* and the court in possession of the facts necessary to a determination of the ultimate issue of this litigation.

The order appealed from, while it provides for an inspection of the books and papers in a foreign country, must be considered in view of the fact that those books and papers are the books and papers of these plaintiffs who here come into court asking advice in regard to the very estate of which these books and papers contain the record.

The order also provided that in lieu of the originals the plaintiffs could produce certified copies, and further provided that the expense of compliance with this order should be paid by the estate. Both of these provisions were wise and proper.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

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EDMUND WRIGHT, as Trustee in Bankruptcy of W. C. LOFTUS & COMPANY, Bankrupt, Respondent, v. GANSEVOORT BANK, Appellant, Impleaded with THOMAS J. LOFTUS and W. C. LOFTUS & COMPANY, Defendants.

First Department, March 22, 1907.

**Bankruptcy — preference by insolvent corporation contrary to section 48 of the Stock Corporation Law — secured creditor entitled to preference to amount of security released — not entitled to full payment when recourse against surety still subsists.**

Although section 48 of the Stock Corporation Law prohibits a preference by an insolvent corporation without regard to the creditor's intent or his knowledge as to the actual or imminent insolvency of the debtor, yet a creditor holding security given in the regular course of business, and not in contemplation of insolvency, who releases the same, on payment in full is entitled to protection even though unsecured creditors get nothing.

But a creditor is entitled to be paid in full only to the extent of the collateral held by him.

Thus, when the creditor of a corporation holds notes indorsed by the president of the corporation, and partially secured by mortgages executed on lands owned by the president and his wife, it will be protected on receiving payment by the corporation without knowledge of its insolvency, to the amount of security surrendered, if it cannot be restored to its former position.

When mortgages partly on the lands of the president of the corporation and partly upon the land of his wife have been given as collateral security for the indebtedness of the corporation, said mortgages as between the creditor and the insolvent corporation are the property of the latter, and in returning the security of the president on payment by the corporation the security is released to the latter.

But as to so much of the debt evidenced by the corporate notes as is merely secured by the indorsements of the president of the corporation and his wife, the creditor is not entitled to full payment by the insolvent corporation as against other creditors for no security has been surrendered, the rule being that the creditor may still look to the indorsers.

INGRAHAM and McLAUGHLIN, JJ., dissented, with memorandum.

APPEAL by the defendant, the Gansevoort Bank, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of June, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, setting aside as preferential and fraudulent a certain payment made by W. C. Loftus & Company to the appellant.

*Philip J. Britt*, for the appellant.

*Abram I. Elkus*, for the respondent.

SCOTT, J. :

This action is brought by a trustee in bankruptcy of a corporation known as W. C. Loftus & Company to recover from the Gansevoort Bank the sum of \$15,000 and interest alleged to have been paid to that bank on the eve of the corporation's bankruptcy in violation of section 48 of the Stock Corporation Law (Laws of 1892, chap. 688, as amd. by Laws of 1901, chap. 354).

The corporation of W. C. Loftus & Company was engaged in the clothing business and one Thomas J. Loftus was its president and had full authority to sign checks and notes in its name and behalf.

On February 3, 1903, Thomas J. Loftus borrowed from defendant upon his own note indorsed by his wife, the sum of \$5,000, the bank knowing that it was a personal loan to him. Later this note

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was renewed by being merged with a series of notes made by the corporation. From time to time the corporation, for business purposes, made and renewed other notes, all of which were signed by the corporation and indorsed by Thomas J. Loftus and his wife. Finally on December 2, 1903, the defendant held three demand notes of the corporation, aggregating \$15,000, upon which interest was due, these notes also being indorsed by Mr. and Mrs. Loftus.

On October 9, 1903, at a time when it does not appear that W. C. Loftus & Company was insolvent, the defendant had received from Thomas J. Loftus, the president of the company, as collateral security for the notes of W. C. Loftus & Company, a mortgage made by Thomas J. Loftus and Mary R. Loftus, his wife, for \$5,000 and an assignment of a bond and mortgage for \$6,000 made by one Russell to Ellen Murtha, the assistant and bookkeeper of Thomas J. Loftus. It was assumed by the court below and by counsel on their briefs that with these mortgages and the indorsement of Mary R. Loftus and a guaranty by her the defendant's loan was fully protected and secured. It further appeared that W. C. Loftus & Company kept a deposit account with defendant, in which had been kept a substantial balance until November 14, 1903, when the account became overdrawn by the sum of \$513.59, in which condition it remained until December 2, 1903. On this latter date the corporation deposited with defendant a sum more than sufficient to make good the overdraft and to pay the amount due upon the notes. On the same day the corporation drew and gave to the defendant bank its check on said bank for \$15,594.01, and received from the bank the notes and the collateral which had been given to secure them. On the same day the corporation drew checks in favor of three other creditors, thereby exhausting its deposit account with defendant. On the very next day a petition in bankruptcy was filed, and in due course W. C. Loftus & Company was adjudged a bankrupt and plaintiff was appointed trustee.

It appears that the payments made by the corporation on December second represented the proceeds of a sale of its merchandise stock and had practically exhausted its entire assets, leaving only about \$200 to pay claims aggregating about \$27,000, but this fact was not known to defendants.

The statute under which plaintiff claims (Stock Corp. Law, § 48), in

so far as it is applicable to this case, reads as follows: "No conveyance, assignment or transfer of any property of any such corporation \* \* \* nor any payment made, judgment suffered, lien created or security given \* \* \* when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid \* \* \*. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. \* \* \* No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice."

The statute is drastic in the extreme, and applies whenever a corporation is insolvent or its insolvency is imminent, if the payment or transfer is made with intent on the part of the debtor to give a preference, without regard to the creditor's intent or even his knowledge as to the actual or imminent insolvency of the debtor. (*Munson v. Genesee Iron & Brass Works*, 37 App. Div. 203.) The court below found that W. C. Loftus & Company was insolvent on December 2, 1903, and the evidence fully sustains that finding. It also found that the payment of \$15,594.01 to the defendant was preferential, and awarded plaintiff a judgment for that amount.

The serious question in the case is whether or not this finding is supported by the facts. In considering this question it is necessary to bear in mind the fact that the bank held ample security for the notes, and that it does not appear that the corporation was insolvent when the security was given, or that it was so given with a view to preferring the bank. In this respect the case presented by the evidence differs widely from *Hilton v. Ernst* (38 App. Div. 94) and *Salt v. Ensign* (79 Hun, 107), much relied upon by the respondent. In *Salt v. Ensign* an insolvent corporation, in contemplation of insolvency, sold and delivered goods to a third party, upon the agreement that the price thereof should be paid to an unsecured creditor in satisfaction of his debt. In *Hilton v. Ernst*, the Kilmer Manufacturing Company, of which plaintiff was receiver, had assigned to defendants certain accounts as security for an indebtedness. One of these accounts had been collected by the officer of the Kilmer Manufacturing Company and the proceeds converted. The

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Kilmer Manufacturing Company, on the verge of insolvency, assigned other accounts to take the place of the one which had been wrongfully collected; it was this last assignment which was declared void, upon the rather narrow ground that the debt for which it was given was that arising out of the collection and conversion of the proceeds of the earlier security, and not the original debt for which the prior security had been given, and thus the case really turned on the point that security had been given in contemplation of insolvency for a debt not, therefore, secured. It was held in *Dutcher v. Importers & Traders' Nat. Bank* (59 N. Y. 5), in a case arising under the Revised Statutes, that, even in the case of a company known to its officers to be insolvent, a payment or sale made in the usual and ordinary course of business by the company, and one which would have been made in the same way if the company had been prosperous and solvent, could not be said to have been made in contemplation of insolvency. In that case an insolvent bank had paid a check drawn upon it by a depositor. In *Paulding v. Chrome Steel Co.* (94 N. Y. 334) the validity of a chattel mortgage, given as security for a debt, was upheld although executed on the very eve of insolvency, because it was simply the carrying out of an agreement previously made by the company to give such security, and was given in substitution of a prior mortgage which had been proved to have been defectively executed. The particular point in all of the foregoing cases applicable to the present is that they recognize the superior right of a creditor holding security given in the regular course of business and not in contemplation of insolvency to hold his security and realize upon it after insolvency, even if he thereby is paid his debt in full, and the unsecured creditors get nothing.

The position of the defendant on and prior to December 2, 1903, was that it held ample security for its loan to the Loftus Company, and had an absolute right to realize upon that security. We think that the act of Loftus & Company in depositing on December 2, 1903, the cash received from the sale of its merchandise assets, and immediately checking out the amount to the defendant bank and a few other favored creditors, must be considered as a payment to the bank of the loan represented by the notes. But to the extent that the bank then held collateral in the shape of the mortgages executed by Mr. and Mrs. Loftus and by Russell, the bank was entitled to

hold the securities until the debt was paid, even if thereby it received a larger proportion of its debts than other creditors of the company were able to realize. When the company tendered payment of the notes the bank, having no knowledge of its insolvency, was justified in accepting the payment, and having done so was bound to return the collateral security as to which it had no further right or claim.

It was by such payment, up to the value of the mortgages, put in no better position than it had been before, but if now required to repay the money it will be in a much worse position, for plaintiff does not offer, nor does it appear that he is able, to restore this security to the bank. We attach no importance to the fact that one mortgage apparently covered property of Mrs. Loftus, and that the other seems to have been the individual property of Thomas J. Loftus. As between the bank and the insolvent company the mortgages were the property of the company. They had been given to the bank by the president of the company as collateral for the company's indebtedness. Thomas J. Loftus was both president and treasurer of the company, and, evidently, its active business manager. He had signed the notes, and the check, as he had a right to do, in the name of the company, and in its behalf had deposited the collateral. In dealing with him the bank was dealing with the company, and in returning the security to him it had returned it to the company.

In so far, therefore, as the check given to the bank on December 2, 1903, represented the value of the two mortgages then held by the bank as collateral security, we do not consider that the payment can properly be said to have been preferential. As to so much of the payment as exceeded the value of the two mortgages a different question is presented. As to that the bank held no security except the indorsements of Mr. and Mrs. Loftus and the personal guaranty of Mrs. Loftus. So far as these are concerned the bank surrendered nothing and will lose nothing if it is required to pay back the money to the receiver. The rule is that in cases where the creditor innocently receives payment from the principal debtor, which he is afterwards required to repay because it constituted an unlawful preference, the debt will not, therefore, be considered as having been paid so as to release the surety, but the creditor may pursue his remedy against the surety as if no payment had been made.

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(*Swarts v. Fourth Nat. Bank*, 117 Fed. Rep. 1, and cases therein cited.) Consequently the defendant bank, even if required to repay so much of the \$15,594.01 as was secured only by the indorsements and guaranty of Mr. and Mrs. Loftus, will be put in no worse position than it would have been in if no payment had ever been made, but may still recover from the guarantors. Our conclusion is, therefore, that in so far as the debt to the bank was secured by the two mortgages above referred to, up to the value of these mortgages, the payment on December 2, 1903, was not preferential and void, but was received in good faith and for a valuable consideration, to wit, the surrender of collateral security to the benefit of which the bank cannot now be restored, but as to the sum paid to the bank, not secured by the mortgages, the payment must be considered as preferential and void, the bank having surrendered no security therefor which is not now as available to it as it was before the debt was paid.

It may be that in another action, upon proper proofs, the plaintiff can recover from defendant bank the \$5,000 originally loaned to Thomas J. Loftus personally and afterwards merged into the indebtedness of W. C. Loftus & Company, but neither the allegations of the complaint nor the evidence would justify a recovery upon that ground in the present action.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., and CLARKE, J., concurred.

INGRAHAM, J. (concurring):

I concur in the result, but I do not concur in what is said by Mr. Justice SCOTT as to the right of the plaintiff to recover any portion of this payment made to the defendant, for the reasons stated in my dissenting opinion in the case of *Perry v. Van Norden Trust Co.* (118 App. Div. 288), decided herewith.

McLAUGHLIN, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

ROBERT G. PERRY, as Trustee in Bankruptcy of BROADWAY TRIMMED HAT COMPANY, a Bankrupt, Appellant, v. VAN NORDEN TRUST COMPANY, Respondent.

First Department, March 22, 1907.

**Bankruptcy — unlawful preference by corporation — Stock Corporation Law, section 48, construed — facts showing unlawful preference — bills and notes — indorser not discharged when payment by maker is unlawful preference.**

To constitute an unlawful preference by an insolvent corporation under section 48 of the Stock Corporation Law, it is only necessary that the corporation shall be insolvent or its insolvency imminent and that the payment shall have been made or the security given with the intent on the part of the debtor to give a preference. The intent of the creditor or his knowledge as to the insolvency of the debtor or the intent of the debtor is immaterial. If, however, the creditor parts with a valuable consideration and is without notice of the insolvency or its imminence, he stands in the position of a purchaser for value without notice, and the transaction is not avoided.

It is not necessary to uncover the "mind" of an insolvent corporation in order to ascertain its intent, and when, being insolvent, it gives all its assets to one creditor, leaving claims amounting to \$10,000 entirely unprovided for, the facts show an intent to give an unlawful preference.

If a creditor holding security innocently and in the due course of business accepts payment from the insolvent corporation and surrenders security to which it cannot be restored, the payment is not preferential or contrary to the statute. If, however, no security is surrendered the rule does not apply. There is no surrender of security by the payment of a note indorsed by a third person, because recourse against the indorser is not lost if the creditor be required to repay.

Ordinarily payment of a note by the maker terminates the liability of the indorser, but the receipt of a preferential payment of an indorsed note contrary to the statute is in contemplation of law no payment and the indorser is not released.

A business corporation liable on four promissory notes indorsed by a third person and held by the defendant trust company and being insolvent, sold all its property and deposited \$1,000 with the defendant at the same time borrowing \$3,000 which it credited on its deposit account and secured by an assignment of its outstanding accounts. The insolvent corporation thereupon drew its check for its total deposit and gave it to the defendant in payment of the unmatured notes leaving itself without assets to meet the claims of other creditors. On all the evidence,

*Held*, that the transaction was an unlawful preference obnoxious to the statute. INGRAHAM and McLAUGHLIN, JJ., dissented, with opinion.



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APPEAL by the plaintiff, Robert G. Perry, as trustee, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 20th day of July, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

*J. G. Engel*, for the appellant.

*Edward W. S. Johnston*, for the respondent.

SCOTT, J. :

In the year 1904 the Broadway Trimmed Hat Company, a domestic stock corporation, had a deposit account with the defendant trust company, and at various times obtained from that company loans represented by promissory notes and secured by the assignment of outstanding accounts. On May 23, 1904, the trust company held two promissory notes of the trimmed hat company, one dated February 17, 1904, for \$2,100, payable on demand, and secured by the assignment of outstanding accounts, and the other dated May 12, 1904, for \$4,600, payable on demand, and also secured by the assignment of outstanding accounts. On these assigned accounts the defendant has collected \$857.45 more than the amount, with interest, due on the notes. On the same date the defendant held three other promissory notes of the trimmed hat company dated respectively February 1, 1904, March 7, 1904, and April 28, 1904, the first two being for \$500 each and the third for \$3,000, each being payable four months after its date, and all being indorsed by one Max Feist. For these notes the defendant held no security save such as was implied by the indorsement of Max Feist. On said May 23, 1904, the Broadway Trimmed Hat Company sold out all its merchandise and fixtures. On the following day, May 24, 1904, it deposited the sum of \$1,000 in the defendant trust company and borrowed from said company the sum of \$3,000, which was credited on its deposit account with said trust company and as security for which the trimmed hat company assigned to the trust company all of its outstanding accounts not theretofore assigned, as well as the equity in the accounts which had thereto-

fore been assigned as security for the loans of February seventeenth and May twelfth. The trimmed hat company thereupon drew a check upon said trust company for \$4,000, which it delivered to the trust company in payment of the unsecured and unmatured notes of February first, March seventh and April twenty-eighth. By these transactions the Broadway Trimmed Hat Company denuded itself of practically all its assets, leaving nothing to meet the claims of the other creditors which aggregated about \$10,000. On May twenty-fourth a petition in bankruptcy was filed against the Broadway Trimmed Hat Company, and in due course the plaintiff was appointed its trustee in bankruptcy. This action is brought under section 48 of the Stock Corporation Law (Laws of 1892, chap. 688, as amd. by Laws of 1901, chap. 354) to recover the amount paid to defendant on May 24, 1904, as a preferential payment. This section, so far as material to this action, reads as follows: "No conveyance, assignment or transfer of any property of any such corporation by it, or by any officer, director or stockholder thereof, nor any *payment made*, judgment suffered, lien created or *security given* by it, or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid \* \* \*. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. \* \* \* Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. \* \* \* No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice."

The terms of the act are very simple. All that is necessary in order that it shall become operative is that the corporation shall be insolvent, or its insolvency imminent, and that the payment shall have been made or the security given with the intent on the part of the debtor to give a preference. The intent of the creditor, or his knowledge as to the insolvency of the debtor or of the intent of the debtor is immaterial. If, however, the creditor parts with valuable consideration, and is without notice of the insolvency or its

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imminence, he stands in the position of a purchaser for value and without notice, and the transaction is not avoided. That the Broadway Trimmed Hat Company was insolvent on May 24, 1904, is indisputable, and there can be no doubt whatever that when it gave all its assets to one creditor, leaving claims amounting to \$10,000 entirely unprovided for, it meant to prefer the creditor to whom the assets were given. It is not necessary to uncover the mind of a debtor in order to ascertain his intent, when the natural, probable and indeed inevitable consequence of his acts is to effect a preference.

The transaction of May 24, 1904, between the trimmed hat company and the defendant cannot be treated or considered otherwise than as a device to give to defendant, under the guise of a new loan, security for the unsecured loan represented by the unmatured notes. The pretended loan of \$3,000; the crediting of that amount on the deposit account of the trimmed hat company, and the immediate payment of the amount to defendant as payment of the unsecured notes was obviously a mere bookkeeping device. The net result was that for its claim of \$4,000 represented by the three unsecured notes, the defendant received a cash payment of \$1,000, and an assignment of accounts, leaving its claim only \$3,000 now represented by a single note. The case must be considered as if, on May twenty-fourth, the trimmed hat company had paid \$1,000 in cash on account of its \$4,000 debt and had assigned the accounts as security for the balance of \$3,000. In this view the case would be a simple one, and the plaintiff's right to a judgment perfectly clear, but for the fact that the notes for \$4,000 taken up on May 24, 1904, bore the indorsement of Max Feist, conceded upon the trial to have been perfectly solvent and responsible.

If a creditor, holding security, innocently and apparently in the due course of business, accepts payment even from an insolvent corporation, and thereupon surrenders his security to which he cannot be restored, the payment cannot be said to be preferential and contrary to the statute, because the creditor has received the payment in good faith and upon a valuable consideration. If, however, the creditor has surrendered no security the rule does not apply. The only security the trust company held was the indorse-

ment of Max Feist, and that security it will not have lost even if it now be required to return to the trustee the money, and the accounts or the proceeds of the accounts, which were assigned to it on May 24, 1904.

Ordinarily, of course, the payment of a note by the maker terminates the liability of the indorser, but the receipt of a preferential payment, contrary to the statute, of an indorsed note, is in the contemplation of law no payment at all, and does not release the indorser. (*Swarts v. Fourth Nat. Bank*, 117 Fed. Rep. 1; *Petty v. Cooke*, L. R. 6 Q. B. 790-796; *Brandt Suretyship* [3d ed.], § 368; *Williams v. Gilchrist*, 11 N. H. 535; *Watson v. Poague*, 42 Iowa, 582.) The defendant trust company, in surrendering the notes indorsed by Feist, did not discharge him, but retained whatever right of recourse it then had against him. So far as he was concerned, its position remained unaltered and the debt remained unpaid, and it does not appear that the defendant has in any way lost its right of recourse against Feist, the indorser. If it appeared, as it does not in the case as presented to us, that the defendant, believing in good faith that its claim had been discharged by payment, and acting upon that belief, had by act or omission effectually discharged the indorser a different question might be presented, which, however, it is not necessary to consider at present. We are, therefore, of the opinion that upon the evidence the payment to the defendant trust company of \$1,000 on May 24, 1904, and the assignment to it on that day of the accounts until then unassigned, and of the equity in the accounts previously assigned was preferential, contrary to the statute and void, and that the plaintiff is entitled to recover the \$1,000 and whatever may have been collected upon the accounts and the equities attempted to be assigned, and a reassignment of so many thereof as have not been collected.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., and CLARKE, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

The only indebtedness that existed in favor of the defendant against the Broadway Trimmed Hat Company was that evidenced by

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three promissory notes made by the corporation to the order of itself and indorsed by one Max Feist. These notes had been discounted by the defendant and belonged to it. It was conceded upon the trial, and the court found, that the indorser was solvent, and the bank could have collected the note from him if it had not been delivered by the defendant to the maker. This being the situation, the corporation, having on deposit with the defendant a sum of money exceeding the amount of these notes, paid to the defendant the amount thereof, although not yet due, and obtained a delivery of the notes from the defendant. It subsequently appeared that this corporation was insolvent, but it is not alleged that the defendant had any knowledge or reason to suppose that it was insolvent or had notice of any fact to put it upon inquiry. It held these notes, indorsed by a perfectly solvent indorser, and it had a right to dispose of them to any one that it pleased. At the request of the maker of the notes it transferred them to it and received the value thereof. Upon the trial the plaintiff conceded, and the court found, that the defendant acted in good faith in its transactions with the Broadway Trimmed Hat Company; that the defendant did not at any of the times mentioned have any knowledge or notice of any intent on the part of the Broadway Trimmed Hat Company, or its officers, to give to this defendant a preference over other creditors of the said company; that the defendant did not at any of the times mentioned have any intent on its part to acquire a preference over other creditors of the Broadway Trimmed Hat Company, and that neither said company nor its officers had any intent in any of its transactions with this defendant to create thereby a preference to this defendant over other creditors of the said Broadway Trimmed Hat Company; and that no transaction had by said company with this defendant did, in fact, create any preference to the defendant over other creditors of the Broadway Trimmed Hat Company.

I think that these findings are sustained by the evidence. What the defendant had and what it was entitled to retain was the obligations of the Broadway Trimmed Hat Company, secured by the indorsement on the notes. It had a perfect right to sell those obligations; and a sale of the instruments, either to the maker of the notes, to the indorser, or to a third party, was not a mere payment of the indebtedness, but was a transfer of the obligations, including

the liability of the maker of the notes and the indorser. A transfer of that paper to the maker, with the indorsement intact and the indorser liable for the payment of the notes when due, transferred the right of the defendant to collect the notes. I cannot see that there is any difference between a transfer of the obligation of an indorser upon a promissory note and the transfer of any other property held by a creditor to secure the payment of an indebtedness.

It is suggested that, notwithstanding this transfer, the defendant, upon the payment of the amount received by it from the corporation to the trustee in bankruptcy, would have the right to enforce the obligation of the indorser; but the obligation of the indorser necessarily depends upon the notes being presented for payment when due, and notice of non-payment thereof to the indorser; and if these notes were never presented for payment, or notice of non-payment given to the indorser, I cannot see how the indorser can be held liable. By the defendant's surrendering the notes to the maker, it parted with all interest in the notes and put it out of its power to hold the indorser liable, and, so far as appears, the notes never were presented for payment when they became due so as to hold the indorser. To treat this transfer of an existing valid obligation which the bank could enforce as a simple preference, void under the statute, without requiring the corporation or the trustee succeeding to its right to restore to the defendant the notes which it delivered to the corporation upon the payment of the money, with the liability of the indorser intact, would be, it seems to me, a violation of settled legal principles. The action is in equity to enforce a liability, designed to prevent the payment of favored creditors by a corporation. It seems to me that this statute is not applicable where the substantial transaction is not solely the preference of a debt due by a corporation, but involves a transfer by a creditor of property or security which it held to secure the payment of the indebtedness, and where the creditor acts in entire good faith without any notice of the insolvency of the debtor or of any intent on its part to create a preference.

It has been assumed that the intent of the creditor, or any knowledge or information sufficient to put the creditor upon inquiry as to the solvency of the debtor, or as to the intent with which a pay-

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ment was made, is entirely immaterial; that all that has to be proved to entitle a trustee or receiver of a corporation to recover is an undisclosed intent on the part of the debtor corporation to prefer one creditor over others. The statute provides that "no \* \* \* payment made \* \* \* by it (a corporation), or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid." If the question were an open one, I should have considerable doubt as to whether the intent to give a preference to a particular creditor must not be an intent in which both the party making the payment and the party receiving the payment participated. A corporation transacting business, apparently solvent and in good credit, giving and receiving credit and paying its debts in usual course as they become due, may still be insolvent, although its condition be concealed from its creditors and others transacting business with it. It does not seem that it could have been the intent of this statute to justify a recovery from creditors whose debts have been paid, upon proof that the corporation was insolvent and that its officers making the payment knew that it was insolvent, and from that adduce the inference that they or the corporation intended to create a preference. If this construction of the law is correct, years after a payment has been made by a corporation to a creditor, a trustee in bankruptcy or a receiver can recover back the money actually paid in satisfaction of an existing debt, merely because of an undisclosed intent of an officer of the corporation making the payment, when the money was received by the creditor in good faith in payment of the corporation's conceded indebtedness to it. But certainly, where it appears that the transaction was not solely the payment of a debt, but obtaining from a creditor the security which the creditor held for the payment of a debt, a finding that no preference was intended within the statute should be sustained.

I think, therefore, that this judgment should be affirmed.

McLAUGHLIN, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

HENRY BELDEN, as Administrator, etc., of HENRY BELDEN, Deceased,  
Respondent, v. WILLIAM BELDEN and Others, Appellants.

First Department, March 22, 1907.

**Executors and administrators — administrator whose letters are revoked on probate of will not reinstated by judgment declaring probate invalid — such administrator not entitled to continue former action.**

After letters of administration were issued an alleged will was discovered and subsequently admitted to probate, the decree revoking the prior letters of administration. Thereafter, in an action under section 2658a of the Code of Civil Procedure, the will was declared not to be the will of the decedent, and the probate was adjudged invalid. The prior administrator on his appointment had brought action to reach property alleged to belong to the estate.

*Held*, that the action abated on the revocation of the letters of administration and could only be revived by the reappointment of an administrator in a new proceeding;

That the fact that the decree admitting the will to probate was vacated did not reinstate the former administrator;

That the decree of the surrogate revoking the letters of administration released the surety of the administrator from liability, and hence the former administrator not having given an enforceable bond was not entitled to continue the former action.

PATTERSON, P. J., and HOUGHTON, J., dissented.

APPEAL by the defendants, William Belden and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of February, 1907, denying the defendants' motion to declare this action abated unless it be properly revived.

*Abram I. Elkus*, for the appellants.

*Charles L. Craig*, for the respondent.

McLAUGHLIN, J. :

On the 31st of August, 1902, Henry Belden, then a resident of the city of New York, died. On the 14th of June, 1904, letters of administration were issued to the plaintiff, and as such he shortly thereafter brought this action to compel the defendant William Belden and other nominal defendants claiming through him to account for certain property alleged to belong to the intestate. In



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October, 1904, the defendant William Belden discovered what purported to be the last will and testament of Henry Belden, deceased, and he filed the same for probate and on the 24th of March, 1905, the same was duly admitted to probate by one of the surrogates in the county of New York, and in the decree admitting it to probate the letters of administration issued to this plaintiff were revoked, and letters testamentary issued to the three persons named in the will as executors. In June, 1906, one of the persons interested in the estate of the decedent brought an action under section 2653a of the Code of Civil Procedure to obtain an adjudication that the paper admitted to probate was not the will of Henry Belden. The action thus brought resulted in a judgment to the effect that the paper was not the last will and testament of Henry Belden, deceased, and probate thereof was in all respects invalid. A certified copy of the judgment was thereafter duly filed as provided in the section of the Code referred to, with the clerk of the Surrogate's Court. Subsequently this action being upon the day calendar and about to be reached for trial, the defendants, by an order to show cause, moved that the same be declared abated unless properly revived by the estate of Henry Belden within a period to be fixed by the court. The motion was denied and defendants have appealed.

I am of the opinion the order should be reversed. The plaintiff ceased to be administrator when the decree of the Surrogate's Court was entered canceling and revoking his letters. He could neither bind the estate, nor could any proceeding against him have any effect upon the estate. (*Taylor v. Savage*, 1 How. [U. S.] 282.) The decree so provides. It is that the letters of administration theretofore issued to him "be and the same hereby are revoked and all authority and right of the said Henry Belden as such administrator are hereupon to cease." The fact that the decree admitting the will to probate was subsequently vacated and set aside is of no importance because that did not reverse or reinstate the decree which revoked the letters of administration issued to the plaintiff. The judgment simply determined that the paper writing produced, purporting to be the last will and testament of Henry Belden, was not his last will and testament, and that the "decree and probate thereof was and is in all respects invalid." When the letters of administration issued to the plaintiff were revoked he ceased to be

an administrator and had no authority in any way to bind the estate formerly represented by him. When letters of administration are revoked, the Surrogate's Court is only authorized to grant letters of administration to the successor in like manner as if the former letters had not been issued and the same proceedings are required (Code Civ. Proc. § 2693), and this is to be done upon a petition setting out the facts showing that the person applying for letters is entitled to them, and if there be other persons having an equal right, then they must be cited to appear. (Id. §§ 2662, 2663; *Matter of Engelbrecht*, 15 App. Div. 541.)

When the plaintiff was appointed administrator he gave a bond, with a surety satisfactory to the surrogate, for the faithful discharge of his duties as such. The decree revoking the letters released the surety from future liability, nor was any liability imposed upon the surety by the judgment in the Supreme Court declaring the decree admitting the will to probate invalid. One cannot act as an administrator without giving a bond, and this is an additional reason why the judgment in the Supreme Court did not reinstate the respondent as administrator.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, unless the action be properly revived by some one representing the estate of the deceased within twenty days after service of a copy of the order of this court and notice of entry of the same.

INGRAHAM and CLARKE, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., dissented.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, unless action be revived as stated in opinion. Settle order on notice.

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JULIUS CAYARD and Others, Suing in Behalf of Themselves and of All Other Stockholders of the TEXAS OIL AND PIPE LINE COMPANY, a Corporation, Who May Come in and Contribute to the Expenses of This Action, Appellants, v. TEXAS CRUDE OIL AND MINING COMPANY, a Corporation, Organized and Existing under the Laws of South Dakota, and Others, Respondents.

First Department, March 23, 1907.

**Practice — compulsory reference in action for accounting not authorized until right to accounting determined.**

In an equitable action for the specific performance of an alleged agreement and for an accounting, when the execution of the agreement is in issue there can be no compulsory reference on the ground that the examination of a long account is involved until the right to the accounting is determined by trial at Special Term.

APPEAL by the plaintiffs, Julius Cayard and others, suing in behalf of themselves, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of November, 1906, referring the action to a referee.

*Walter Carroll Low*, for the appellants.

McLAUGHLIN, J. :

This action was brought for the specific performance of an alleged agreement and for an accounting.

The answers of the different defendants put in issue the existence of the agreement and the right of the plaintiffs to the relief claimed. After issue had been joined, an order was made referring the matter to a referee to hear and determine, and the plaintiffs appeal therefrom.

The appeal is well taken. The action is in equity and the right to an accounting depends upon the existence of the alleged agreement, and this having been denied in the answers of the different defendants, it was the issue to be tried. This issue does not require the examination of a long account, or bring the case within the provisions of the Code (§ 1013) which authorize a compulsory

reference. The plaintiffs are entitled to have the question of their right to an accounting determined by a trial at Special Term, before a reference can be ordered to take an account. (*Jones v. Lester*, 77 App. Div. 174; *Leary v. Albany Brewing Co.*, 66 id. 407; *Know v. Gleason*, 63 id. 99; *Hilton v. Hughes*, 5 id. 226; *Averill v. Emerson*, 74 Hun, 157.) If it be there determined that the right to an accounting exists, then a reference may be ordered.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

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PAUL R. G. HORST, Appellant, v. MONTAUK BREWING COMPANY,  
Respondent.

First Department, March 22, 1907.

**Sale — delivery of goods to railroad to order of vendee.**

In an action by a seller for damages by reason of the failure of the buyer to accept and pay for goods, it appeared that the contract called for the sale and delivery of twenty-four bales of hops; that after the delivery of sixteen bales by the seller the buyer did not reply to the seller's demand that the delivery of the balance be accepted. The seller stored the balance of the hops, branded and tagged with the name of the buyer, with a warehouseman and with a railroad company, sending the invoices to the buyer, who retained the same without objection but failed to remove the hops. The seller sent the buyer a second copy of the invoices. The buyer replied claiming the right to take the hops at his convenience, and the seller being notified by the railroad to remove the hops stored them in a warehouse for the buyer's account and sent him the warehouse receipts, which were also retained.

By the custom of trade, where no time is specified for delivery of hops, it must be made before new crops come in.

*Held*, that the complaint was improperly dismissed;

That in an action for goods sold and delivered the seller may, upon tender of performance and demand of payment and refusal, treat the property as belonging to the buyer and sue for the recovery of the agreed price;

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That an actual physical delivery of the goods is not necessary, and where manual delivery of the goods is inconvenient on account of bulk, placing them in the power of the buyer with a symbolic delivery by forwarding the warehouse receipts, is sufficient.

HOUGHTON, J., dissented.

APPEAL by the plaintiff, Paul R. G. Horst, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 19th day of October, 1906, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case upon a trial at the New York Trial Term.

*George A. Strong*, for the appellant.

*Martin S. Lynch*, for the respondent.

McLAUGHLIN, J.:

On the 1st of March, 1905, the defendant purchased from the plaintiff forty bales of hops, as evidenced by a written instrument, of which the following is a copy:

"BROOKLYN, N. Y., *March 1st*, 1905.

"Bought to-day of Mr. Paul Horst (20) twenty bales choice Oregons at 29 cts., (20) twenty bales choice New York State hops at 30 cts. per lb., deliverable in 10 or 15 bale lots, as per written order of Montauk Brewing Company, payable in ten days after delivery. Samples to be submitted must be satisfactory.

"MONTAUK BREWING COMPANY.

"By C. D. RHINEHART.

"CHARLES ALBRESCH."

In May following sixteen bales of the New York State hops were delivered and paid for. This action was brought to recover the purchase price of the other twenty-four bales, the complaint alleging delivery and defendant's failure to pay. The answer admitted the agreement and delivery of the sixteen bales which were paid for, but alleged that the plaintiff failed and refused to submit samples of the Oregon hops, and denied that any of the hops called for by the agreement were delivered except the sixteen bales.

At the trial the complaint was dismissed at the close of plaintiff's case and he appeals. The question presented turns upon whether

the plaintiff had in fact, prior to the commencement of the action, delivered to the defendant the hops, or had so far performed in that respect upon his part as to entitle him to recover the purchase price. The facts relied upon by the appellant, as entitling him to maintain the action, are as follows: After the delivery of the sixteen bales in May the defendant did not call for the remaining twenty-four bales, and on the twenty-first of August following the plaintiff wrote the defendant asking when it would be convenient for it to receive the balance—saying that he did not wish to hurry defendant, but, nevertheless, would like to make delivery in the near future. The letter was not answered, nor was any attention paid to it. Albresch, the broker who represented the plaintiff in the transaction, also made repeated efforts to have defendant order the balance of the hops delivered. His efforts, however, were unsuccessful, and on the sixth of November the plaintiff stored with one Loewi, 35 Pearl street, New York city, four bales of New York State hops, and with the Southern Pacific Railway Company, pier 37, North river, New York city, twenty bales of Oregon hops, all of which he had branded or tagged with the name of the defendant. On the same day he sent delivery orders, weigher's returns and invoices for these twenty-four bales to the defendant. Defendant retained these documents without objection, but did not remove the hops, and on the seventeenth of November plaintiff again wrote defendant, by registered letter, to the effect that he had on the sixth of the same month sent invoices and delivery orders, but, not hearing from defendant in the meantime, feared the orders might have been misplaced, and, therefore, inclosed duplicates of the same. To this letter the defendant replied on the following day, saying it inclosed a copy of the contract, and according to its understanding of the same, defendant was at liberty to take the hops at its convenience. It made no other objection to the delivery as made, nor did it return or offer to return the delivery orders, either duplicates or originals, but retained them and produced all of them at the trial. On the nineteenth of December following plaintiff wrote defendant that he had been notified by the railroad company and Loewi to immediately remove the hops stored with them respectively; that he had done so, and stored the same in a warehouse for defendant's account and risk, and inclosed the warehouse receipt therefor, at the same time

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asking for a remittance on or before a time specified. The warehouse receipt was also retained by the defendant and produced at the trial.

It also appeared, without objection, that where hops are sold and no time specified for delivery, according to the custom of the trade, delivery must be made before new crops come in, which is in September or October of each year.

Upon these facts I am of opinion that the complaint was improperly dismissed. The rule now seems to be well settled that in an action for goods sold and delivered the seller may, upon tender of performance on his part and demand of payment and refusal of the purchaser to perform, treat the property as belonging to the defendant and sue for a recovery of the price agreed to be paid (*Mason v. Decker*, 72 N. Y. 596); that he is entitled to recover the price when he shows not only that the purchaser failed to pay, but that he himself was ready to perform and has delivered or offered to deliver the goods (*Dunham v. Munn*, 8 N. Y. 513); that the omission to prove an actual physical delivery does not prevent a recovery (*Butler Brothers v. Hirzel*, 87 App. Div. 462; *affd.*, 181 N. Y. 520); that where manual delivery of goods is inconvenient on account of their bulk it is unnecessary; placing the goods in the power of the vendee is sufficient; an actual delivery is not required; a symbolic delivery suffices, and delivery of an order on the warehouseman may be enough. (*Salmon v. Brandmeier*, 104 App. Div. 69.) It was unnecessary for the plaintiff to take the hops to the door of the defendant's brewery. It had refused, though requested to do so, to order the hops delivered either there or anywhere else. Under such circumstances the plaintiff had a right to make the delivery as he did, inclosing documents which evidenced that the defendant not only had the title but could go and get the hops whenever it saw fit. It is true the plaintiff, after the delivery orders had been sent to and retained by the defendant, put the hops in a warehouse, but he was under no obligation to do this. He might have left them where they were and let the defendant stand the consequences. However, what was done in this respect was for defendant's benefit. It was at once informed of what was done, and the warehouse receipts were sent to it, which were retained without objection.

In *Butler Brothers v. Hirzel* (*supra*) the plaintiff brought an action for the purchase price of goods alleged to have been sold and delivered. On the trial it appeared that the plaintiff had taken the goods to the place of delivery and defendants had refused to accept them, so that they were never actually out of the possession of the plaintiff. The complaint was dismissed, substantially on the ground that the cause of action therein set forth was not proved, but this court held there was sufficient proof to entitle the plaintiff to maintain the action for the price agreed to be paid, and the judgment was reversed and a new trial ordered. In the case now under consideration the proof of the delivery of the hops is much more favorable to the plaintiff than in that case.

If the foregoing views be correct, then it necessarily follows that the court erred in dismissing the complaint.

Other questions are presented by the appellant as to the exclusion of evidence, which, except for the conclusion reached, would require serious consideration.

The judgment appealed from, therefore, must be reversed and a new trial ordered, with costs to appellant to abide event.

INGRAHAM and CLARKE, JJ., concurred; PATTERSON, P. J., concurred in result; HOUGHTON, J., dissented.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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AMBROSE B. STANNARD, Respondent, v. ROBERT H. REID & COMPANY, Appellant.

First Department, March 22, 1907.

**Pleading** — when amendment at former trial available on new trial — contract — when corporation bound by acts of president — when corporation liable on former contract after discharge of receiver — when plaintiff not entitled to interest on recovery for breach of contract.

When on a former trial the complaint is amended to conform to the proof by a formal amendment set out in the record changing the date of the execution of a contract, but no formal order is entered and no amended complaint is served, the plaintiff is entitled on another trial to have the benefit of the former amendment, although the record does not show that it was allowed to conform the complaint to the proof.



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The plaintiff had entered into a contract with the defendant corporation subletting certain work upon a building under construction for the government, for the performance of which contractors were required to give security. The contract was negotiated and signed by the president of the corporation, who owned half the stock and managed its affairs. Thereafter upon the application of other stockholders receivers of the corporation were appointed, they being empowered to complete existing contracts and to continue the business. The receivers at first agreed to complete the contract with the plaintiff, but afterwards repudiated it as unprofitable, though all other existing contracts of the corporation were carried out. The president of the corporation purchased the stock of other stockholders, and, on his application showing that the company was solvent, the receivers were ordered to turn over the assets of the corporation, which was not dissolved, but the receivers were discharged with like effect as if the proceeding had not been taken.

*Held*, that the contract was made before the receivers were appointed, and that the effect of their discharge on the application of the sole stockholder without requiring an accounting was to turn over the property of the corporation subject to all liabilities whether incurred by the corporation or by the receivers, who under the circumstances must be treated as agents of the corporation, contrary to the general rule;

That as the contract had been negotiated with the president, who owned half the capital stock and had charge of the management of the business, the corporation was bound by his acts;

That as the plaintiff sent the contract in duplicate to the corporation, which was signed by its president and returned, it was immaterial that the plaintiff did not notify the defendant that he had signed it;

That although the contract required the defendant to give a bond, and the plaintiff had waived that requirement in his negotiations with the receivers, the contract was not thereby invalidated, for a failure to give a bond was a breach of contract by the defendant;

That as the contract as matter of law was made prior to the receivership, and as on the abolition of the receivership the property was restored subject to existing liabilities, an error of the court in refusing to charge that unless the contract was made before the appointment of the receivers there could be no recovery, was not prejudicial to the defendant;

That as the plaintiff brought suit before reletting the contract to another party, and did not set out that the work had been relet, or claim damage on the basis of a difference between the contract price and the cost under a new contract, he was not entitled to interest on the sum found due, for the damages were not liquidated.

INGRAHAM, J., dissented, with opinion.

APPEAL by the defendant, Robert H. Reid & Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th

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day of October, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 26th day of October, 1906, denying the defendant's motion for a new trial made upon the minutes.

This action was brought to recover damages for an alleged breach of contract to do marble and terrazzo work in the United States Post Office and Court House at Elinira, N. Y. The issues have been tried three times. On the first trial the jury disagreed and on the second the complaint was dismissed, but upon appeal this court reversed the judgment (114 App. Div. 135) and granted a new trial, which resulted in the verdict in favor of the plaintiff, which is the basis of the judgment from which this appeal is taken.

The plaintiff alleges that on or about the 20th day of November, 1901, defendant entered into a contract with him, a copy of which is annexed to and made a part of the complaint; that defendant abandoned the contract and plaintiff was obliged to employ another contractor to perform the same to his damage in the sum of \$3,500.

It is stipulated that on the first trial the complaint was amended to conform to the proof by a formal amendment drafted and recited in the record, amending the 2d paragraph of the complaint by reciting it as it then stood and adding an allegation that the contract was executed and delivered on the 3d day of January, 1902, but no formal order was ever entered amending it and no amended complaint was served. The amendment contains no reference to the fact that it was allowed to conform the complaint to the proof and contains no limitation as to the purpose or effect of the amendment. Appellant contends that as the jury disagreed at that trial the plaintiff could not have the benefit of that amendment at this trial.

The answer admits the incorporation of the defendant, denies the other allegations of the complaint and alleges two separate defenses and a counterclaim. It alleges that on or about the 7th day of February, 1902, when the contract was wholly unexecuted, the court on the application of a stockholder of the defendant in proceedings for its voluntary dissolution, which were not instituted by the defendant, appointed receivers of the defendant, and that by operation of law it became unable to and did not continue in business until the discharge of the said receivers on February 7, 1903; that plaintiff had due notice of all the said proceedings; that the

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receivers were authorized by the court to carry out all valid contracts of the corporation and that they refused to carry out said contract on the ground that the same was not the contract of the corporation; that the plaintiff took no steps whatever for his own protection or that of the defendant, and that any damage he may have suffered was the result of his carelessness and neglect. The answer also sets forth that the contract, if executed, was executed without any authority or power in the person executing the same; that the same never became operative as a contract as it was never accepted, but rejected by the plaintiff. The counterclaim asked that the contract, if executed, be canceled, annulled and surrendered to defendant. Plaintiff replied, denying the material allegations of the counterclaim.

The plaintiff had a contract with the United States government to build the post office and court house building at Elmira, N. Y. This alleged sub-contract with the defendant was for the interior marble and terrazzo work. Plaintiff was responsible to the government for the entire contract and executed a bond to the government for the faithful performance of the entire work. He sub-let various parts of the work to sub-contractors, from whom he endeavored to procure bonds acceptable to the company which was his surety.

It appears that prior to November 20, 1901, negotiations were had between plaintiff and representatives of the defendant, principally with Robert H. Reid, its president, with reference to sub-letting the marble work; that samples were submitted and bids received by plaintiff from defendant which resulted in the preparation by plaintiff of the contract in suit, which bears date November 20, 1901, and provides, among other things, that at the time of the execution and delivery defendant should cause to be executed and delivered to plaintiff "a bond with good and sufficient surety or sureties in the sum of Five thousand dollars (\$5,000), conditioned upon the full, faithful and complete performance of this agreement." The contract price was specified as \$10,000, and the contract contained a provision to the effect that defendant should make such preparation for performing the work as would enable him to complete the work within sixty days after notice to commence it. On said 20th day of November, 1901, the plaintiff inclosed the contract in duplicate, with bond attached, in a letter which he addressed to

the defendant, with the request to "Please execute these papers and furnish the samples of red marble as quickly as possible." Plaintiff received no reply to this letter, and on December second he wrote defendant asking that the agreement and bond be executed and returned to him without delay, and receiving no reply, he again wrote defendant to the same effect on December 26, 1901, saying in the latter letter: "My Bond Co. on Elmira have called upon me to show up my sub-bonds which are all in my hands except yours and \* \* \*. Please have yours in to-morrow, Friday, if possible. You know that I consider there is no other necessity for asking bond of you."

Thereafter plaintiff received the contract, with bond attached, executed by Brown & Sutton, as sureties, inclosed in a letter from defendant dated January 3, 1902, which contained a request for another copy of the contract on the ground that one of the duplicates sent by plaintiff had been lost. On January 9, 1902, plaintiff wrote the defendant as follows:

"I am sorry we tried to run in your bond and Bickford, More & Co.'s with so much Brown and Sutton.

"My bond company compliment you by passing Bickford, More & Co.'s bond as O. K., but throw your bond back at me with request that Brown and Sutton justify before a notary in double the amount of their bond as required by law.

"They also call my attention to an error in the typewriting of the bond and the filling in of the county as 'Manhattan' instead of 'New York,' and request me to send them a copy of your agreement.

"I have, therefore, had prepared two new copies of the agreement, which please sign and have witnessed where marked, and execute a bond with somebody else on it. \* \* \*

"Please return both copies to us as soon as possible, and oblige, very truly yours."

On the 10th day of January, 1902, defendant's secretary and treasurer wrote plaintiff, acknowledging the receipt of the letter and contents, and stating that the company would rectify the matter and return the bond with new names on it. Not having heard from defendant on January 20 and January 29, 1902, plaintiff again wrote, asking for the return of the contract and bond signed; but received no reply to these letters.

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During the negotiations one-half of the capital stock of defendant was owned by Thompson & Starrett, and the other half was owned by Robert H. Reid, who was the president of the company. Most of plaintiff's letters to defendant were addressed "Dear Reid," and nearly all of defendant's letters to plaintiff were signed in the name of the defendant by Reid. It appears that dissensions arose between Thompson & Starrett and Reid, each seeking to control the management, which resulted in Reid's instituting proceedings for the voluntary dissolution of the corporation. On February 3, 1902, Reid presented a petition to the court asking for the appointment of temporary receivers, and setting forth, among other things, that he was president of the company, and that Thompson & Starrett had threatened to ruin the corporation and to acquire it free and clear of his interest, and that they and others had conspired to that end and in furtherance of their conspiracy had secretly and without notice to him held an unauthorized and fraudulent meeting of the other stockholders and elected said Thompson and Starrett and one Burke, who was not a stockholder, and then elected Burke president, and elected another not a stockholder treasurer, and instigated creditors to bring actions against the company which had been "in a prosperous condition," and instigated the landlord to institute summary proceedings to dispossess defendant, and at their instigation the usurping president had issued notes of the company to them, and "that all this has made the company insolvent, and unless a receiver is appointed herein and an injunction issued, the assets of the corporation will be completely wiped out, under the scheme of fraud adopted by the said Thompson & Starrett."

Annexed to the petition were schedules of the assets and liabilities of the company, also a list of uncompleted contracts, eighteen in number, including the Elmira contract with plaintiff. The court on the 6th day of February, 1902, appointed said Reid and one Seeger temporary receivers of the company, with the usual powers of receivers, and restrained the creditors and stockholders from suing the defendant. The receivers qualified by filing a bond for \$30,000, and all the assets and property of the company were thereafter turned over to them.

On February 17, 1902, the receivers presented a petition to the court, duly verified, wherein they state "That in the opinion of

your petitioners, the value of all the assets and contracts will be more than enough to pay the creditors in full, provided the same be not sacrificed by the cessation of the plant. \* \* \* That annexed hereto is a schedule of contracts which the said corporation now has for various kinds of work aggregating in amount \$131,302.14."

"That as your petitioners have, from inquiries made by them, learned and now allege, the said contracts taken together are very valuable and if properly completed should result in a profit to the company of at least twenty thousand dollars, but if not completed the same will be a total loss, and in addition to which the corporation will be liable to the various persons who made such contracts for any deficiency in the carrying out of the contracts."

Annexed to the petition is a schedule of eighteen uncompleted contracts of the corporation, including that with plaintiff. An order was granted and entered on the 17th day of February, 1902, in accordance with the prayer of the petition, authorizing and empowering the receivers "to complete or dispose of all the contracts \* \* \* of the said corporation now incomplete, a schedule of which contracts is annexed to the petition." The order also authorized the receivers to perform "such other work as they may obtain." The receivers completed all of the eighteen contracts excepting that with plaintiff at a profit, and did work not included in the schedules, making new contracts and doing new jobs of various kinds.

It was conceded on the record that the receivers as such, after their appointment, confirmed the contract with the plaintiff and agreed to carry it out. Negotiations continued with respect to the bond and finally plaintiff, in view of the fact that the receivers had been authorized to carry out the contract and had given a bond, waived it. No work was actually done, however, by the receivers or defendant in performance of the contract, but the receivers frequently promised to proceed with the work down to about the 1st of May, 1902, and the contract was amended by mutual consent.

Shortly after the appointment of receivers, Starrett, of Thompson & Starrett, testifies, "Within a month," and Reid says, "the end of June or the beginning of July," 1902, Reid became the owner of all of the stock of the company, by purchasing and paying for Thompson & Starrett's 250 shares.

In the fall of 1902, after Reid became sole owner of the stock,

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plaintiff repeatedly urged defendant to prepare to do the work, and receiving no reply, wrote defendant — he addressed all communications to defendant after as well as before the receivership — on October 13, 1902, saying :

“ I have, therefore, to state that the said working drawings and statement of your progress with the work must be in my hands this present week or I must by Monday, October 20th, serve upon you the five days' notice provided by my contract with the Dep't and your agreement with me, and take up the work for your account.”

On October 17, 1902, the receivers wrote the following letter to the plaintiff :

“ In reply to your letter of the 13th, we beg to state that we find that under the changed conditions from the time when the Elmira contract was taken and the present writing that it would not be right for us to proceed with this contract. While at the time the Robert H. Reid & Co. took this contract it may have been a good one, at the present writing it is not a desirable one. We, as receivers, are not allowed by the Court to run unnecessary risks or continue any work that might not show a profit at the outset ; hence our deciding not to continue this contract. We have, however, obtained prices from several out-of-town concerns, thinking that perhaps we might be able to dispose of this contract advantageously, and at the same time not occasion you any loss from a time as well as a financial standpoint. The best prices that we were able to obtain were \* \* \*.

“ We regret that we were not able to arrive at this decision sooner, but it took some time to get these different prices \* \* \*. There is no reason why, if this contract is given out immediately, there should be any delay. \* \* \*.”

On October 18, 1902, plaintiff addressed another letter to the *company*, giving the five days' notice, and, after the expiration of the five days' notice, requested the scale drawings and specifications, etc., which were in the possession of the receivers. On the individual petition of Reid, on notice to the receivers, to their surety and to the Attorney-General, but to no one else, the court on the 7th day of February, 1903, by order discharged the receivers and directed them to turn over the assets in their hands to the corpora-

tion, and canceled their official bonds and vacated the injunction against actions by creditors. The order discharging the receivers also contained a clause as follows:

"It is ordered that this proceeding be and the same hereby is discontinued and the order to show cause made herein and filed February 7th, 1902, why the said corporation should not be dissolved, BE AND THE SAME IS DISCHARGED with like effect as if said proceedings had not been taken."

The petition for the discharge of the receivers recited the facts concerning their appointment, and averred, among other things, that

"The main ground for the commencement of this special proceeding was the inability of the two factions controlling the said corporation to agree, and that such inability and disagreement jeopardized the assets of the said corporation, and for the purpose of meeting the demands of creditors, rendered the property upon a forced sale insufficient to meet the demands of such creditors. \* \* \*

"That thereafter the hearing before the referee on the order to show cause herein proceeded, and during such proceeding and in or about the month of June, 1902, your petitioner and the said Thompson & Starrett, the owners together of all the stock of the corporation, compromised their differences with respect to the management of the corporation, and the said Thompson & Starrett sold out all their holdings in the stock of the said corporation to your petitioner, who thereupon succeeded to their interests and is now in control of the whole of the capital stock of the said corporation.

"Your petitioner further shows that all of the unsatisfied engagements at the time of the filing of the petition herein, none now remain undisposed of, the receivers having completed or disposed of all the contracts or unsatisfied engagements upon which the said corporation was liable, and that during the period of the said receivership your petitioner, personally, has acquired by payment and assignment, all of the claims which creditors hold against said corporation at the time of the making of the order to show cause herein, except (claims secured by his personal notes, not yet due).

"\* \* \* That the assets of the said corporation at the present time, exclusive of the lease, which is a valid asset of the said corporation amount to more than \$50,000 in value and consist of a large amount of property, accounts and contracts, while the total



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indebtedness not acquired by your petitioner and for which claims are made, does not exceed the sum of \$33,000, and that the said corporation is absolutely solvent and your petitioner is assured that the said corporation will meet all claims as they become due hereafter, the balance of the claims amounting to upwards of \$20,000 being held by your petitioner.

"Your petitioner further shows that the causes which led to the institution of these proceedings, are now eliminated, and that therefore there is no reason for the continuation of these proceedings \* \* \*."

Reid also testified that "all the former creditors of the corporation were paid during the receivership period, not by the receivers, if that is what you mean. Their claims were not compromised, they were paid in full 100 cents on the dollar by me personally out of my personal funds. They were paid by me and the corporation afterwards paid me."

Upon the discharge of the receivers, Reid resumed the presidency of the company and held the office until March, 1905, but severed his relations with the company and ceased to be a stockholder early in July, 1906.

After the discharge of the receivers, and on February 19, 1903, the plaintiff entered into an agreement with the J. Franklin Whitman Company, of Philadelphia, the lowest bidder, to do the work called for by the Elmira contract with defendant or the receivers, for the sum of \$13,125, or \$3,125 in excess of the price at which defendant or the receivers agreed to do the work. When plaintiff contracted with the Whitman Company he did not know that the receivers had been discharged. The Whitman Company subsequently performed the contract and was paid in full by plaintiff, who brings this action to recover \$3,125 and interest from October 17, 1903, the difference between the price paid the Whitman Company and the price at which the defendant or the receivers agreed to perform the work, on the ground of breach of contract.

At the close of the case both parties moved for the direction of a verdict. The court announced its readiness to direct a verdict, whereupon the defendant withdrew its motion and asked that the case be submitted to the jury. The jury rendered a verdict for the full amount of damages claimed by plaintiff, with interest from the

date of the last payment to the Whitman Company. The defendant requested the court to charge, among other things, that unless the contract was made on or about the 20th day of November, 1901, the defendant was entitled to a verdict, and also that "if the jury find that the alleged contract was not entered into before the appointment of the receivers, then their verdict must be for the defendant," which requests were declined and counsel for the defendant duly excepted. The other material facts appear in the opinion.

*Robert Goeller* [*Jacob H. Shaffer* with him on the brief], for the appellant.

*Lyman A. Spalding* [*George S. Scofield, Jr.*, with him on the brief], for the respondent.

LAUGHLIN, J. :

I am of the opinion that the plaintiff was entitled to the benefit of the formal amendment to the complaint made on the first trial. It only related to the date that the contract became of force. The contract bore date the day it was originally alleged to have been made. The amendment changed that date from November 20, 1901, to January 3, 1902, the day the defendant mailed the contract signed by it to the plaintiff. The court would doubtless have directed the service of the pleading as amended had that been requested.

The court by declining to instruct the jury that there could be no recovery unless the contract was made prior to the appointment of the receivers, in effect permitted a recovery even though the contract was made by the receivers. The general rule is that receivers are officers of the court, deriving their authority under the law from the court, and that they are not the agents of the party of whom they are appointed receivers in the sense that they have authority to bind the party by any act or omission on their part (*Ahern v. Steele*, 115 N. Y. 203, 232; *Lottimer v. Lord*, 4 E. D. Smith, 183, 191; *Railroad Co. v. Soutter*, 2 Wall. 510, 519; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 236; *Texas & St. L. Ry. Co. v. Rust*, 17 Fed. Rep. 275, 282; *Dow v. Memphis & L. R. R. Co.*, 20 id. 260, 269; *General Electric Co. v. Whitney*,

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74 id. 664, 667; Smith Receivers, ¶ 35; Alderson Receivers, §§ 5, 301); and with respect to contracts made by them, the rule is that they only in their official capacity and the property in their hands are liable, and that the liability should be enforced in the receivership proceedings. (*New York & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166, 168; *Heath v. Missouri, K. & T. R. R. Co.*, 83 Mo. 617.) It is doubtful, therefore, whether the corporation would be liable if the contract was made by the receivers, unless under the order discharging the receivers, but the circumstances relating to this receivership are peculiar, and in the view I take of this case it is unnecessary to decide that question. If the contract had been made by the receivers there would also be difficulty in view of the form of the pleading, and it may well be even if the corporation would be liable, that it should have been alleged that the receivers made the contract and that the circumstances relating to the receivership and to the discharge of the receivers should have been alleged. I am of opinion that as matter of law the contract was made by the defendant before the receivers were appointed, and that the effect of the order discharging the receivers without requiring an accounting by them, made upon the application of the sole stockholder of the company, was to turn the property over to the corporation subject to all the liabilities, whether incurred by the corporation or by the receivers, whom the court, by the order discharging the receivers, apparently treated as the agents of the corporation, and that the corporation by accepting the property from the receivers and continuing the business acquiesced in this view and became bound accordingly. The material facts in the negotiations with respect to the contract are contained in the statement of facts and need not be restated. Reid, who negotiated and signed the contract for the defendant, owned half the capital stock, was president of the company and in charge of the management of its business, and as to third parties dealing with the corporation was presumably authorized to execute the contract. When the defendant received the draft of the contract in duplicate from the plaintiff it understood that the plaintiff intended to award the contract to it, and on signing the contract it was entered upon the books of the defendant as a contract. It appears by the evidence that upon the receipt of the contract thus signed by the defendant the plaintiff signed it. It is

immaterial that he did not notify the defendant that he had signed it, because it was assumed by both parties that the contract had been executed, and the only question left open was the approval of the bond which the defendant by signing the contract obligated itself to give. Nor does it appear that the parties were unable to agree with respect to the bond. The plaintiff did not reject the bond executed and tendered by the defendant. He retained it and produced it upon the trial. At the suggestion of his surety on the general contract with the government he sought to obtain another bond and the defendant manifested a willingness to furnish it. After the appointment of the receivers, in view of their having furnished a bond as receivers and having been authorized by the court to execute this contract, plaintiff waived any further bond. For aught that appears the bond furnished by the defendant complied with its contract to furnish a bond with good and sufficient sureties; but even though it did not, the contract had been made and it was expressly therein provided that the defendant should furnish such a bond. If it did not do so it would have been guilty of a breach of the contract which would have justified the plaintiff in reletting the work and holding it responsible for his damages; and on the other hand, if the plaintiff rejected a bond that complied with the contract, he would have been guilty of a breach of the contract and the defendant would have been entitled to recover the profits it would have made on the contract. It may be that an erroneous view indulged in by both parties that their negotiations constitute an agreement, does not establish a contract between them (*Nundy v. Matthews*, 34 Hun, 74, 79), but the understanding on the part of both parties that a binding contract had been made, and steps taken by them thereunder with a view to the performance of the contract, are to be considered material evidence of great weight on the question. The validity of the contract was recognized in the petition for the appointment of the receivers, but Reid, at that time, was acting in his individual interest as a stockholder and not as president of the corporation and his declaration, not being in the line of duty, doubtless was not binding upon the company; and yet this receivership appears to have been merely a receivership *in form* brought about, not as represented to the court for the dissolution of the corporation, but to enable Reid to obtain control of the corporation, as is shown by the facts that

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Reid became the active receiver and soon after his appointment negotiated the purchase of the other one-half of the capital stock of the company not owned by him, and stopped the proceedings before the referee, and, finally, by his petition for a discharge of the receivers without an accounting, in effect showed that the company had not been insolvent, and its solvency at that time is clearly established by the evidence. The proceedings before the referee with reference to proof of claims against the corporation, if begun, were not completed. Neither the referee nor the court passed upon claims against the company, nor did the court pass upon claims arising during the receivership nor require any accounting by the receivers. These matters were doubtless dispensed with owing to the fact that Reid had become the sole stockholder of the company and desired to have the receivership terminated, and the property restored to the company, to enable him to continue the business. In these circumstances, the proper construction of the provision of the order discontinuing the proceeding and discharging the receivers "with like effect as if said proceedings had not been taken," is that the property was restored to the corporation subject to all of the liabilities of the corporation — and probably to all of the acts and proceedings of the receivers — and by accepting back the property and resuming the business, the corporation assumed the liabilities. If, therefore, it can be affirmed as matter of law that the contract was made prior to the receivership and that the effect of the order discontinuing the proceedings and discharging the receivers was to restore the property to the company subject to existing liabilities, it would seem that the error of the court in declining to charge that unless the contract was made before the appointment of the receivers there could be no recovery, was not prejudicial to the defendant.

This court on the former appeal (114 App. Div. 135) expressed the view that whether the company would be liable on the contract if made by it prior to the appointment of the receivers would depend upon whether the receivership was necessitated by the insolvency of the company, in which event the view was expressed that it would not be liable, but that the company would be liable if the receivership was brought about by it with a view to avoiding its obligations. On the last trial the question as to whether the com-

pany was insolvent was submitted to the jury, as a question of fact, under instructions as to the burden of proof in accordance with the decisions of this court on the former appeal. The verdict of the jury shows that they found that the company was not insolvent and their determination is fairly sustained by the evidence.

The court instructed the jury, as matter of law, that if plaintiff was entitled to recover, he was entitled to recover interest from the 17th day of October, 1903, the date of the last payment made by him to Whitman & Co., to whom he relet the work on defendant's failure to perform the contract. Counsel for the defendant duly excepted to this instruction. The evidence shows that plaintiff relet the work shortly prior to the commencement of the action, but it does not appear that the defendant was aware of the fact or had knowledge of the contract price. Nor did the plaintiff in his complaint allege the fact that the work had been relet or claim damages on the basis of the difference between the contract price for which defendant agreed to perform the work and the cost thereof which he agreed to pay under the new contract. He alleged generally that he sustained damages by defendant's breach of the contract in the sum of \$3,500, and demands judgment for that amount, together with interest thereon. Upon the trial he proved, without objection, that the additional cost of the work, instead of being \$3,500, was \$3,125, and this was not controverted. Under the instructions of the court the jury added to that amount the sum of \$565.62 as interest. I am of opinion that this was error. The damages were not liquidated. It is true that there was a market price for the various items of material, but it cannot be said that there was a market price for the entire contract work, which involved the furnishing of material and the performance of labor. The plaintiff did not know even approximately what it would cost him to have the work done. He was obliged to receive bids, which differed in amount, and he selected the lowest, and did not even then assume to fix his damages on that basis or notify the defendant. Nor did he recover the amount of damages which he alleged in the complaint.

The other points presented by the appellant have been examined, but do not require special consideration in the opinion.

It follows, therefore, that the judgment should be modified by

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deducting therefrom the sum of \$565.62, together with interest thereon from the rendition of the verdict to the time of entry of judgment, and as so modified affirmed, without costs.

PATTERSON, P. J., HOUGHTON and LAMBERT, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I dissent, as I do not think that there was a contract by which the defendant undertook to do the work, for a failure of which the plaintiff has recovered a judgment. The defendant's bid to do the work was accepted, and the plaintiff forwarded to defendant a contract to be executed. That contract contemplated the giving of a bond by the defendant which would be satisfactory to the plaintiff before the contract became operative. The defendant executed the contract and forwarded the same with a bond to the plaintiff, but the plaintiff refused to accept the bond, prepared and forwarded to the defendant a new contract with a new bond to be executed by the defendant, and that bond was never executed, nor was the new contract ever executed. When the receivers were appointed, there being no binding contract in existence, the action of the receivers in obtaining authority to complete all the contracts made by the defendant cannot be considered as a formal execution of the new contract; nor do I understand from the record that the receivers ever formally executed the new contract. They certainly never signed a new contract, or assumed to bind either themselves or the company to carry out the contract which had been executed by the defendant, but which had been rejected by the plaintiff. The acceptance by the company of the property transferred to it by the receivers when they were discharged was not assuming the obligation that the receivers had incurred as to executory contracts which had never been formally entered into, and upon which no work had been done or obligation incurred by the receivers. The defendant asked the court to charge that the acts of the receivers were not the acts of the corporation; and that if the jury found that the alleged contract was not entered into and accepted by both parties before the appointment of the receivers, their verdict must be for the defendant. The court refused these requests, and the defendant excepted. I think this was error. The complaint alleged the

making of the contract by the corporation, a copy of which was annexed to the complaint. There was no allegation in the complaint that a contract had been made with the receivers which had been assumed by the corporation. The only contract alleged in the complaint, therefore, was that made by the defendant corporation, and if no enforceable contract was made by the defendant corporation upon this complaint, I do not think that the action could be sustained. Any ratification or agreement made by the receivers could not be the basis of an action for damages for a breach of a contract alleged to have been made, not by the receivers, but by the corporation before the appointment of the receivers, and in view of the form of the action I think the defendant was entitled to have the jury instructed that the plaintiff could not recover unless he proved a binding contract with the corporation.

I think the judgment should be reversed.

Judgment modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

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EUGENE L. BUSHE, Individually and as Sole Surviving Executor, etc., of FREDERICK BEDFORD, Deceased, and EUGENE L. BUSHE and STEPHEN FISKE, Individually and as Trustees under the Last Will and Testament of FREDERICK BEDFORD, Deceased, Respondents, v. MARY E. WRIGHT and Others, Respondents, Impleaded with HELEN M. BEDFORD, Appellant, and Others.

First Department, March 22, 1907.

**Executors and administrators — when legatee of a deceased beneficiary cannot compel executors of a deceased executor to account — concurrent jurisdiction of surrogate and Supreme Court on accounting by executors — findings not embodied in report not available — limitation of action against executors.**

Although a deceased executor and trustee has never accounted for the trust estate, any right of a beneficiary to an accounting passes on his death to his personal representatives for the benefit of his estate, and his widow individually or as sole legatee and devisee has no cause of action enforceable in her own right.

The Supreme Court and the Surrogate's Court have concurrent jurisdiction to compel executors and trustees to account, but the Supreme Court will only act



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where the Surrogate's Court may not have full jurisdiction to decide the questions, as where there are conflicting claims to real estate.

When the executors of a deceased executor bring an action in the Supreme Court for the judicial settlement of their accounts, the representatives of a deceased beneficiary of the estate under administration by the deceased executor has no standing to compel the executors of the deceased executor to account for his acts when it is shown that he never made an accounting; especially so, when all parties interested in the unadministered estate are not before the court and it is not certain that the Statute of Limitations had run upon their claims.

A finding by a referee that the creditors and legatees of the prior estate have all been paid will not be considered when not contained in the report but only in separate findings.

Although when there is a defect of parties defendant, they will ordinarily be brought in on terms, the rule does not apply when in an action by the executors of a deceased executor for an accounting of his estate, the defendant raises new issues by asking them to account for the acts of the testator as executor of his wife.

Although under section 2606 of the Code of Civil Procedure the surrogate has jurisdiction when an executor dies to compel the executor of the deceased executor to account, on petition of his successor, as if the decedent had lived and his letters had been revoked and a proceeding for accounting been instituted against him, the section contemplates that the funds so reached should not be paid to a creditor or legatee instituting the accounting but to the successor of the deceased executor or into court or to some person authorized by law to receive the fund.

A beneficiary's right to an accounting from the representatives of a deceased executor accrues the moment they are appointed, and the Statute of Limitations runs in ten years, except as suspended by a period of infancy.

APPEAL by the defendant, Helen M. Bedford, from a judgment of the Supreme Court in favor of the plaintiffs and certain of the defendants, entered in the office of the clerk of the county of New York on the 22d day of March, 1906, upon the report of a referee.

*Julius M. Mayer* [*O. J. Wells* with him on the brief], for the appellant.

*Franklin W. M. Cutcheon* [*Morgan M. Mann* with him on the brief], for the plaintiffs, respondents.

*Frederic R. Coudert* [*Howard Thayer Kingsbury* with him on the brief], for the respondents Zerega and others.

*Tompkins McIlvaine* [*Joseph Potts* with him on the brief], for the respondent Wright.

LAUGHLIN, J.:

Frederick Bedford died on the 28th day of December, 1891, leaving a last will and testament, which was duly admitted to probate on the 25th day of January, 1892, by the Surrogate's Court of the county of New York, as a will of real and personal property. He appointed his brother, Gunning S. Bedford, and his friend, Eugene L. Bushe, executors of his will and trustees of the trusts thereby created. The executors qualified and entered upon their duties and continued in the discharge thereof without having accounted, until the death of Gunning S. Bedford on the 29th day of October, 1893. No successor to Gunning S. Bedford as executor was appointed, but on the 29th day of March, 1894, Stephen Fiske was appointed his successor as trustee.

This action was brought by Eugene L. Bushe, individually and as surviving executor of said Frederick Bedford, and by him and said Stephen Fiske, individually and as trustees under the will, to have their accounts judicially settled and to obtain a decree providing for a sale of the property in their hands not converted into cash, and for a distribution of the trust funds and for their discharge.

Frederick Bedford, by his will, after bequeathing legacies aggregating \$9,000, bequeathed and devised one-quarter of the remainder of his estate to his brother, Gunning S. Bedford, and bequeathed and devised the rest, residue and remainder to his executors and trustees in trust, to receive the rents, issues and profits, and to apply the net income, so far as necessary, to the maintenance, support and education of his son, Gunning S. Bedford, Jr., during minority, and thereafter "to his maintenance and support in a style and manner befitting his station in life," with directions to apply a portion of the net income and profits to the maintenance and support of the wife of his son, in case he should marry, and to their issue, if any, and provided that upon the death of his son, the executors and trustees should pay over the trust estate, together with any income thereof in their hands, to the issue of his son, if any then living, or their descendants, and in default thereof to his brother, Gunning S. Bedford, and in case of his death, then to the heirs of the testator. The will authorized the executors and trustees to convert the real and personal estate into cash and to reinvest the same in their discretion.

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Gunning S. Bedford, Jr., the son of the testator, was born on the 7th day of June, 1871, and survived his father, but died on the 17th day of February, 1903. He left a widow, the appellant, but no children. He also left a will, in and by which he bequeathed and devised all of his estate to his wife, and he appointed her and said Stephen Fiske and Eugene L. Bushe executrix and executors thereof. Neither Fiske nor Bushe accepted the appointment or qualified, but the widow qualified and acted alone. This action was commenced on the 25th day of August, 1903, and she was made a party defendant both individually and as executrix of her husband's will.

The appellant and her husband had represented to the executors of and trustees under the will of Frederick Bedford that they had a child, the issue of their marriage, but it subsequently developed that this was untrue and that the representation had been made with a view to obtaining a larger allowance during the continuance of the trust and the three-fourths of the residuary estate which would go to such issue in the event of the death of the father. They represented that this child's name was Eugenie Frederica Bedford. A child, whom they adopted and gave that name, died. The plaintiffs, also with a view to obtaining a decree that would be binding upon the heirs at law and next of kin of such child, if she were the issue of the marriage or left heirs at law or next of kin, made them parties defendant in the title of the action, as follows: "The unknown heirs at law and next of kin and personal representatives, if any, of Eugenie Frederica Bedford, so called, deceased," and caused service upon them under the same description to be made by publication. The plaintiffs' prayer for relief is as follows: "Wherefore, plaintiffs pray that this Court, by its judgment, judicially settle and allow the account of said plaintiff Eugene L. Bushe as executor with said Gunning S. Bedford, 2nd, and of said plaintiff Eugene L. Bushe as sole surviving executor of the will of said Frederick Bedford, deceased, and the accounts of said plaintiff Eugene L. Bushe as trustee with said Gunning S. Bedford, 2nd, and of the plaintiff Eugene L. Bushe as sole surviving trustee, and of said plaintiffs Eugene L. Bushe and Stephen Fiske, as trustees under the will of said Frederick Bedford; and approve and confirm all the acts and proceedings of plaintiffs or either of them as executors or

executor or trustees or trustee; and fix the commissions and compensations to which each of them is entitled as executor and as trustee; and authorize them to pay from said trust estate all proper charges thereon that may be established herein or otherwise, and if necessary, authorize plaintiffs, by a sale or sales of property heretofore held by them as such trustees, to realize funds wherefrom to pay and retain such commissions and compensations and to satisfy such charges; and also construe the said Last Will and Testament of said Frederick Bedford, deceased, and determine the effect thereof with reference to any and all questions that may arise upon such accounting or in this action, concerning the validity, construction or effect of said will; and that by its said judgment the Court adjudge and define the various interests of the parties to this action in said estate and trust fund, and adjudge that each of the defendants hereto be excluded from and enjoined from asserting thereafter any interest whatsoever in or lien upon the property constituting the fund heretofore held by the plaintiffs as such trustees as aforesaid, or any part thereof, save such interest therein or lien thereon, or some part thereof, as such defendant may be, by said judgment, determined to possess or to be entitled unto; and that plaintiffs may be authorized and decreed to turn over and convey the moneys, real estate and other property constituting said trust estate unto the person or persons so determined by said judgment to be entitled thereto; and that by its said judgment the Court adjudge and define the various interests of the parties to this action in the moneys heretofore collected or that prior to the entry of said judgment may have been received by plaintiffs as income of said trust estate accruing after the death of said Gunning S. Bedford, 3rd, and that plaintiffs may be authorized and directed by said judgment to pay over said moneys to the parties so determined to be entitled thereto; and instruct these plaintiffs as to their duties in the premises; and, finally, discharge said plaintiff Eugene L. Bushe of and from all accountability as executor and trustee of the Last Will and Testament of said Frederick Bedford, and both said plaintiffs of and from all accountability as trustees of said will; and likewise grant unto the plaintiffs such other and further relief in the premises as may be just, together with judgment for the costs of this action, and their disbursements therein."

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The appellant, both individually and as executrix of her husband's will, served an answer herein December 2, 1903, in and by which she denies that certain real estate described in the complaint as being the individual property of said Frederick Bedford — her husband's father — was such individual property, or was devised to or is held by the plaintiffs as executor or trustees of his said estate; and she therein alleges that said property was purchased by said Frederick Bedford as executor of the estate of M. Amelia Bedford, with funds of that estate; and further alleges that none of the property vested in the plaintiffs as trustees, or could vest in them as trustees until after an accounting by the plaintiff Bushe as executor. The appellant, individually and as executrix, further answering the complaint, alleged as a separate defense and counterclaim, among other things, that M. Amelia Bedford was the wife of said Frederick Bedford and the mother of the appellant's husband; that she died on the 14th day of July, 1871, leaving a last will and testament appointing her husband executor and trustee thereunder and testamentary guardian of her child, should she leave any, and in case she should leave a child she devised and bequeathed her residuary estate, one-half to her husband and the other half to him in trust for the child, to receive the rents, issues and profits and apply the same to the support, maintenance and education of the child during minority, with remainder over to the child on attaining full age, and to his issue in case of death prior thereto; that the estate of said M. Amelia Bedford consisted of a large amount of personal property and of a seven-sixteenths interest in real estate devised to her under the will of her former husband, Lucius Chittenden; that by virtue of a power of sale the executor of said Lucius Chittenden sold at public auction the real estate in which said M. Amelia Bedford had an undivided interest, and accounted to said Frederick Bedford as her executor for her share in the proceeds, part of which he invested in purchasing from the executor of said Lucius Chittenden a part of the land at Fort Washington, N. Y., so sold, taking title in his individual name; that said Frederick Bedford never filed an account nor accounted as executor or trustee under the will of M. Amelia Bedford, and never divided her estate or settled with his son in whole or in part; that Eugene L. Bushe and Gunning S. Bedford, brother to the testator Frederick Bedford,

acted as guardians and *in loco parentis*, and as attorneys and advisers for the appellant's husband after his father's death and until he became of age, at which time there was due to him approximately the sum of \$150,000 from the estate of his mother, no part of which has been paid; that on the death of Frederick Bedford his executors took possession of the assets of the estate of M. Amelia Bedford and of the land, title to which had been taken in his name as aforesaid, and failed to inform the appellant's husband, who was inexperienced in business, of his rights in the estate of his mother, and he failed to discover the same; that appellant's husband employed said Eugene L. Bushe as his attorney at law and as an agent, and in view of those relations of trustee and *cestui que trust*, and of guardian and ward, that existed between them, her husband was guided by his wishes, and also trusted in his uncle, the other executor and trustee of his father's estate, with reference to his property rights; that they professed to be acting in his behalf, but failed to take any proceedings to assert his rights or recover his interest in the estate of his mother, of which they had full knowledge, and that they acted in fraud of his rights, and the fraud was not discovered until after his death; that there is now due to the appellant in her husband's right, one-half of the residuary estate of M. Amelia Bedford, amounting approximately to the sum of \$150,000, with interest thereon from the 14th day of August, 1872; that the only persons now interested in the estate of M. Amelia Bedford are the appellant and Eugene L. Bushe, as sole surviving executor of Frederick Bedford; that the defendants Wright, Gallagher, Zerega, Blanchard and Martinot have received certain assets and property of the estates of M. Amelia Bedford, and of appellant's husband's father and uncle, Gunning S. Bedford, for which they are accountable to said estates respectively, the exact nature and amount of which cannot be ascertained until the accounts of said respective estates have been settled, and that each of the defendants claim some interest in said real estate purchased by said Frederick Bedford with the funds of the estate of M. Amelia Bedford. For a second defense and counterclaim, the appellant, individually and as executrix, alleges that said Eugene L. Bushe has received certain property as the agent or attorney of appellant's husband, including the sum of \$24,000 received as the proceeds of the sale of certain

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lands purchased by the appellant's husband's father, as executor and trustee of M. Amelia Bedford, title to which was taken in his name as such executor, and of other assets of the estate of said M. Amelia Bedford, and of said Frederick Bedford and of appellant's husband's uncle, for which he has not accounted, and that an accounting therefor has been demanded. Judgment is demanded for the amount due the appellant's husband from the estate of his mother, and that the same be declared a lien on the lands owned by Frederick Bedford at the time of his death, and that said real estate be sold for the payment thereof; that Eugene L. Bushe, as sole surviving executor of Frederick Bedford, account for the acts of Frederick Bedford as executor and trustee of the estate of M. Amelia Bedford, and for his own acts in relation to the property of her estate, and that said Eugene L. Bushe, individually and as trustee, account to the appellant for all property received by him for the use of appellant's husband, and that all other defendants be barred from any interest in the property or estate of Frederick Bedford until the amount found due to the estate of M. Amelia Bedford shall be paid, and in case the estates of Frederick Bedford and of appellant's husband's said uncle should be insufficient to satisfy the amount due the appellant, that the plaintiffs and the other defendants be directed to pay back any money or property they have received from said estates or from the estate of said M. Amelia Bedford, and that the same be applied in satisfaction of appellant's claim.

I am of the opinion that the counterclaims were properly dismissed. It is not sought to recover damages for fraud. The allegations of fraud were made evidently with a view to avoid the Statute of Limitations as a defense to the counterclaims. The allegations that the appellant and the plaintiff Bushe, as sole surviving executor of Frederick Bedford, are the only persons now interested in the estate of M. Amelia Bedford, are allegations of a legal conclusion, and are inconsistent with other facts alleged. It is expressly alleged that Frederick Bedford never accounted as executor of or trustee under the will of his wife, M. Amelia Bedford, and that her estate has never been judicially settled. Whatever rights the appellant has with respect to the matters set forth in the counterclaims she derives through her husband and in his right

against the estate of his mother, M. Amelia Bedford. *She appeals only individually*, and it is doubtful whether in that capacity she has any rights that could be enforced in any action or proceeding, but certainly she has none that can be enforced in this action. It is not claimed that her husband left any real estate which descended to her. He at most had a claim for an accounting, with possibly the right to have part of the amount found due declared a lien on the lands purchased by the deceased executor in his own *name individually* with trust funds. Whatever right of action, if any, vested in favor of her husband in the premises passed to his personal representatives for the benefit of his estate, concerning which concededly there has been no accounting or settlement, and she, individually or as a legatee or devisee under his will, clearly had no cause of action enforceable in her own right. (*Woodin v. Bagley*, 13 Wend. 453; *Squire v. Bugbee*, 65 App. Div. 429; *Mount v. Mount*, 68 id. 144.) Her husband had a right to have the estate of his mother settled and to obtain his distributive share, if any, after the payment of the debts and specific legacies. This right passed to his executrix, as such, and it did not vest in his legatees or devisees. The appellant now stands before this court merely in the right of a legatee or devisee of her husband. By virtue of the provisions of section 2606 of the Code of Civil Procedure her husband or his executrix could have compelled the executors of Frederick Bedford to account for his acts as executor and trustee under the will of M. Amelia Bedford, but I find no provision of law authorizing even such a proceeding by a *legatee or devisee of a legatee or devisee*. The appellant, individually, has no better standing to maintain the causes of action embraced in her counterclaims than has a creditor or legatee to maintain an action to recover money owing to the decedent. The affirmance might well rest on this ground alone.

If, however, the appeal could be considered as having been taken both individually and as executrix, I am of opinion that the result would be the same. The Supreme Court and the Surrogate's Court have concurrent jurisdiction to compel executors and trustees to account, but it is well settled that the Surrogate's Court is the appropriate tribunal for such an accounting, and that the Supreme Court will ordinarily exercise its jurisdiction only in special cases



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where the Surrogate's Court may not have full jurisdiction to decide all questions involved. (*Borrowe v. Corbin*, 31 App. Div. 172; *affd.*, 165 N. Y. 634; *Hard v. Ashley*, 117 id. 606; *Sanders v. Soutter*, 126 id. 193; *Bevan v. Cooper*, 72 id. 317; *Douglas v. Yost*, 64 Hun, 155; *Chipman v. Montgomery*, 63 N. Y. 235; *Haddow v. Lundy*, 59 id. 320; *Leggett v. Stevens*, 77 App. Div. 612.) Here conflicting claims have arisen, and the ownership and sale of real estate being involved, the action was properly brought in the Supreme Court. I know of no provision of statutory law, however, or principle of equity jurisprudence authorizing the court to compel the executors of a deceased executor to bring an action for the judicial settlement of their accounts, to account therein for their testator's acts as executor to a defendant who is the personal representative of a legatee or devisee under the will and also his legatee and devisee. Where, as here, the estate concerning which the accounting is sought to be had has not been settled, it would seem, even if the appellant had brought the action, that no accounting should be had until the estate of M. Amelia Bedford is represented, or at least that the accounting should be had in the interest of and for the benefit of all interested in her estate, and that the money should be paid into court if an administrator of her estate has not been appointed. Unless all claims against her estate are barred by the Statute of Limitations, I know of no method of judicially determining whether any exist, except by an accounting. It is clear that under section 2606 of the Code of Civil Procedure the successor of the deceased executor could compel the personal representatives of the deceased executor to account. It cannot be that the same cause of action is vested in the appellant and in the successor to the deceased executor when appointed. The allegations of the appellant and the separate findings made by the referee that the debts and legacies of M. Amelia Bedford have all been paid and that there is no one interested in the estate except the appellant and the executor of Frederick Bedford, deceased, are I think of no avail, since it appears and the referee has found that no judicial settlement of the accounts of the executor of her estate was ever had, and since it is manifest that the Statute of Limitations may not yet have run against her creditors or legatees. Moreover, the finding that the debts of M. Amelia Bedford and her lega-

cies have all been paid and that the appellant and the executor of Frederick Bedford, deceased, are the only persons now interested in her estate are not contained in the report, but are embraced in separate findings and, therefore, under the recent decision of this court in *Elterman v. Hyman* (117 App. Div. 519) they cannot be considered. It may be that if an administrator with the will annexed of M. Amelia Bedford had been appointed and he had refused on demand to call the executor of the deceased executor to account, either in the Surrogate's Court or by action, the personal representatives of her deceased son or even his legatee or devisee might have maintained the action upon alleging these facts, but the administrator with the will annexed would be a necessary party, because the action would ordinarily, at least in the absence of some agreement or facts constituting a waiver or estoppel, such as existed in *Hyde v. Stone* (7 Wend. 354); *Segelken v. Meyer* (94 N. Y. 473) and *Goodyear v. Bloodgood*. (1 Barb. Ch. 617) and do not exist here, only lie in behalf of the administrator with the will annexed or of a creditor or legatee of the estate in behalf of all others interested in the estate and not as set up in the counterclaims here for the exclusive benefit of a single legatee or devisee, or for the legatees or devisees of a legatee or devisee. (*Woodin v. Bagley*, 13 Wend. 453; *Beecher v. Crouse*, 19 id. 306; *Jenkins v. Freyer*, 4 Paige, 47; *Schultz v. Cookingham*, 30 Hun, 443; *Squire v. Bugbee*, 65 App. Div. 429; *Western R. R. Co. v. Nolan*, 48 N. Y. 513; *Matter of Hodgman*, 11 App. Div. 344; *Riggs v. Cragg*, 89 N. Y. 480; *Pritchard v. Hicks*, 1 Paige, 270; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Brown v. Ricketts*, 3 Johns. Ch. 555; *Davoue v. Fanning*, 4 id. 199; *Hallett v. Hallett*, 2 Paige, 15; Barb. Parties [2d ed.], 522, 728.) Where there is a defect of parties defendant, ordinarily the case will not be dismissed, but an opportunity will be afforded plaintiff, on terms, to bring in the necessary parties. That rule, however, cannot avail the appellant, for it does not apply to a new issue sought to be presented by a defendant in which parties other than those already before the court are interested. The plaintiffs are not in court to account for the acts of their testator as executor of his wife. They merely seek an accounting concerning their own acts as his executor. It appears that certain real property undisposed of by the testator still stands in his name as executor of his wife. The plaintiffs have

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not attempted to submit that property to the jurisdiction of the court, but the appellant seeks to obtain an adjudication concerning it. These circumstances show the confusion and unsuperable obstacles that arise in any attempt in this action to require the plaintiffs to account for the acts of their testator as executor of his wife's estate. The defendants who are respondents contend, in effect, that an accounting by the plaintiffs for their testator's acts as executor of his wife's estate is foreign to the action, and should not be required herein. As already observed, the action is brought for a decree settling the accounts of the plaintiffs as representatives of the estate of Frederick Bedford, deceased, and concerning his individual property only. If the appellant has a cause of action against the plaintiffs, or either of them, as the representative of the deceased executor and trustee of M. Amelia Bedford, or for an accounting, she should have instituted a separate action therefor, and if there was danger that in the meantime some of the property for which she claims they are accountable to the estate of M. Amelia Bedford, or upon which the estate should have a lien on account of the investment of trust funds therein, would be sold or distributed, such sale or distribution might have been enjoined. We do not deem it necessary upon this appeal to consider the claim that the purchase of real estate by Frederick Bedford with funds belonging to the estate of his wife, and taking title in his own name, constituted a breach of his trust, or the answering argument that as between him and his son he made a division of the property which they were entitled to under the will of M. Amelia Bedford, by taking title to part in his own name for himself and title to part as executor in trust for his son, which trust was attempted to be carried out subsequently by the Wright trust deed, and that there was a ratification of the devise of the property by the appellant's husband after he attained his majority. It is evident that the husband of the appellant had no interest in the property, the title to which his father took in his own name individually, except to follow the trust funds to satisfy any interest that it might appear on an accounting that he had in the estate of his mother. An accounting first is essential to determine his interest, and that is the basic relief demanded by appellant in her answer, the other relief demanded being dependent thereon. At common law the rule was that the personal

representatives of a deceased executor or administrator could not be called to account by his successor for any property which he had misapplied or converted; but that rule was based on the theory that such property had been *administered* and that the right of action passed to the creditors, legatees or distributees. (*Beall v. New Mexico*, 83 U. S. 535; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Marsh v. People*, 15 id. 284; *Yale v. Baker*, 2 Hun, 468; *Young v. Kimball*, 8 Blackf. [Ind.] 167. See, also, *Trustees of Theological Seminary of Auburn v. Kellogg*, 16 N. Y. 83, and *Good-year v. Bloodgood*, *supra*.) This rule of the common law, however, no longer prevails in this State, for by section 2606 of the Code of Civil Procedure jurisdiction is conferred upon the surrogate, where an executor, administrator or trustee dies, on the petition of his successor, to compel the executor or administrator of the deceased executor or administrator to account as if the decedent had lived and his letters had been revoked, and a proceeding for an accounting had been instituted against him. (*Matter of Rogers*, 153 N. Y. 316; *Matter of Wiley*, 119 id. 642.) Although the surrogate might, under this section, require the accounting at the instance of a creditor before the successor to the deceased executor was appointed, yet the funds, instead of being paid to a creditor or legatee instituting the accounting proceeding, should be paid to the successor to the deceased executor or into court or to some person authorized by law to receive the same, which does not mean a mere creditor or legatee. (Code Civ. Proc. §§ 2603, 2606; *Matter of Moehring*, 154 N. Y. 423; *Mount v. Mount*, 68 App. Div. 144; *Squire v. Bugbee*, *supra*; *Matter of Irvin*, 68 App. Div. 158; *Matter of Wood*, 34 Misc. Rep. 209; *Matter of Hicks*, 54 App. Div. 582; *revd. on other grounds*, 170 N. Y. 195; 1 Jessup Surr. Pr. [2d ed.] 780.)

If, however, the appellant individually has a standing to assert the counterclaims, or the notice of appeal be deemed sufficient to present the rights of her deceased husband's estate, and if the counterclaims are properly pleaded and their validity may be decided in this action, still I am of opinion that the Statute of Limitations is a bar thereto. Her husband's right to an accounting, if any be had against the personal representatives of the deceased executor, accrued the moment they were appointed, which was on

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the 25th day of January, 1892. (*Matter of Wiley*, 119 N. Y. 642; *Matter of Clark*, Id. 427.) The cause of action against the personal representatives of Frederick Bedford, to require them to account for his acts as executor of M. Amelia Bedford, is independent of any cause of action that existed against their testator in his lifetime, and it accrued the instant they were appointed and qualified as his personal representatives. The appellant's husband could have at once upon their appointment petitioned the surrogate to require them to account, and if the facts warranted, he could have brought an action in the Supreme Court for like relief instead. The Statute of Limitations applicable to such an action is ten years from the time it accrues. (*Matter of Rogers*, 153 N. Y. 316.) In the case at bar, however, this is changed somewhat by the infancy of her husband. He became of age on the 7th day of June, 1892, and the ten-year period of limitation which had been suspended by his infancy until that time then commenced to run, and the ten years expired before his death, which occurred on the 17th day of February, 1903. The answer containing the counterclaims was served on the 2d day of December, 1903, thereafter. For the purpose of the Statute of Limitations with respect to the counterclaims, the service of the answer is deemed the commencement of the action on the counterclaims, and consequently the action was barred before the answer was served.

It follows, therefore, that the judgment should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM and SCOTT, JJ., concurred;  
CLARKE, J., concurred in result.

Judgment affirmed, with costs. Settle order on notice.

THOMAS J. BEARDMORE, Appellant, v. ELIZABETH M. BARRY,  
Respondent.

First Department, March 22, 1907.

**Vendor and purchaser — lands described by metes and bounds — refusal to take title — evidence — when understanding as to meaning of "more or less" inadmissible.**

When a contract for the sale of real estate describes the premises by metes and bounds, evidence of what the parties understood the words "more or less" to mean is inadmissible in an action on the contract.

In an action by a vendee to recover earnest money paid on a contract to convey lands described by metes and bounds which were qualified as being "more or less," the payment of the consideration was not dependent upon the foot frontage or specific area. The evidence showed a good record title to 170 feet frontage with a possession by the vendor of 1.25 feet more which had never been contested and which would probably ripen into title. On all the evidence, *Held*, that the vendee was not justified in refusing title, and was not entitled to recover the earnest money.

**APPEAL** by the plaintiff, Thomas J. Beardmore, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 10th day of January, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

This is an action brought by the assignee of the vendee under a contract for the sale of a parcel of real estate in the city of New York, to recover the amount paid to apply on the purchase price and the expenses incurred for counsel fees and disbursements in the examination of the title. The contract was made between defendant and plaintiff's assignor on the 28th day of November, 1904. Defendant therein agreed to convey to plaintiff's assignor the following described premises:

"All that certain piece or parcel of land, with the buildings thereon erected, situate, lying and being in the Twenty-third Ward of the City of New York, bounded and described as follows:

"BEGINNING at a point on the northwesterly side of Boston avenue, formerly Boston road, distant two hundred and thirty-nine and twenty-four one-hundredths feet (239.24) southwesterly from the corner formed by the intersection of the southerly side of One Hundred and Sixty-eighth street and the northwesterly side of Boston

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avenue, thence running northwesterly and parallel with One Hundred and Sixty-eighth street, one hundred and sixty-three and three one-hundredths feet (163.03); thence southwesterly and parallel with Boston avenue, one hundred and seventy-one and fifteen one-hundredths feet (171.15); thence southeasterly and again parallel to One Hundred and Sixty-eighth street, one hundred and sixty-three and eighty-two one-hundredths feet (163.82) to the northwesterly side of Boston avenue, and thence northeasterly along the northwesterly side of Boston avenue, one hundred and seventy-one and twenty-five one-hundredths feet (171.25) to the point of beginning; said dimensions being more or less.

“And being the same premises conveyed to the party of the first part by James and Charles Whealen, by deed, dated Sept. 7th, 1892, and recorded in Liber 4, page 121 under Block No. 2614 of section 10, and known at present as No. 1169 Boston road, New York city.”

The consideration specified was \$75,000, and it was not left to depend on feet frontage or square feet or quantity. The vendor agreed at her own proper cost and expense to “execute, acknowledge and deliver to said party of the second part, or to his assigns, a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to him or them the fee simple of the said premises free from all incumbrances,” excepting certain restrictions not here involved. The premises in question were on the 29th day of May, 1876, owned by one Lucia L. Fitch and James P. Fitch, and on the foreclosure of a mortgage executed by them on that day title passed to one Wensley on the 15th day of December, 1879, and by mesne conveyances to one James Whealen on the 31st day of May, 1884. The description contained in the judgment of foreclosure and in the subsequent conveyances upon which Whealen’s title rested is the same. This description, so far as material, described the premises as lot No. 133 on a map entitled “Map of the Village of Morrisania, made by Andrew Findlay, surveyor, dated West Farms, Aug. 10, 1848, and filed in the office of the register of the county of Westchester;” and after describing the entire lot, giving metes and bounds, showing a frontage of 205 feet on Boston avenue, it contains a clause as follows: “excepting and reserving thereout a strip of land on the northerly side of said lot thirty-five feet in width,” which is also described by metes and bounds. Findlay’s

map shows lots Nos. 124, 133 and 134 fronting on Morse avenue (Boston avenue) between Sixth street on the north (now One Hundred and Sixty-eighth street) and Fifth street on the south (now One Hundred and Sixty-seventh street) and gives the frontage of lot 133 on Morse avenue as 205 feet, which, after deducting the 35 feet on the north, excepted from the conveyances, would leave 170 feet frontage conveyed by the deed. On June 12, 1884, Whealen mortgaged the premises to one Burns, and therein described them as having a frontage of 170 feet on Morse avenue, and on December 10, 1887, he conveyed a one-half interest to his brother Charles by the description by lot number, metes and bounds, and excepting said 35 feet off the northerly side. On September 7, 1892, James and Charles Whealen conveyed the premises to defendant by the same description as is contained in the contract of sale, wherein it appears that the frontage of said premises on Boston avenue (formerly Boston road and Morse avenue) is given as 171.25 feet, which is the first attempt to convey more than 170 feet frontage.

On the 7th day of April, 1905, the final adjourned day for closing title under the contract, it appears that the parties met at the office of the company which was examining the title for the plaintiff, defendant and plaintiff being represented by counsel, and plaintiff's assignor attending in person. Defendant's counsel first tendered a deed which contained the description of the property according to the contract, giving the starting point as 239.24 feet south of the intersection of the southerly line of One Hundred and Sixty-eight street and Boston avenue. This plaintiff's counsel refused to accept, on the ground that it did not contain the proper description, whereupon counsel for defendant tendered a second deed containing the same description, with the exception that the starting point was given as 229.24 feet south from One Hundred and Sixty-eighth street, which plaintiff's counsel also refused to accept on the same ground. Plaintiff's counsel testified that he asked defendant's counsel if they claimed adverse possession to anything beyond 170 feet, and that if they had any proof of adverse possession he would like to see it then, and that defendant's counsel replied that they would not discuss that question and did not care to offer any proof; that the only claim defendant's counsel made in regard to their title to a frontage greater than 170 feet was that there was a



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surplusage in the block, but that he refused to offer any proof as to such surplusage; that plaintiff's counsel offered to give defendant an adjournment for the purpose of satisfying plaintiff that they were in possession of the additional 1.25 feet, but this adjournment was refused and defendant's counsel insisted upon his tender; that plaintiff then refused to sign the bond or to take the deed, and demanded the return of the money paid and \$400 for counsel fees, which demand was refused. Defendant's counsel testified on cross-examination that he did not claim that any explanation was made as to how defendant claimed title to the additional 1.25 feet, and admitted that he said on the day the tender was made that he was not obliged to give any proof on that point. After this meeting between the parties, and on April 17, 1905, plaintiff began this action. In addition to demanding a vendee's lien for the amount paid, and that the premises be also charged with the expenses of having the title examined, and interest, plaintiff demanded specific performance of the contract, or that it be decreed that defendant convey so much of the property described in the agreement as she might have record title to, with an allowance to the plaintiff for so much of said property as the defendant might be unable to convey, and filed a *lis pendens*. Upon the trial plaintiff withdrew his prayer for specific performance. The answer was a general denial.

It appears that there was an old frame house toward the northerly side of the premises, and otherwise they are vacant. On the north a brick apartment house or flat had been erected, covering or substantially covering the 35 feet of the northerly side of the lot excepted in the conveyances. On the south and forming the lot line between lots Nos. 133 and 134, was an iron pipe or picket fence. The vendee testified that he had a conversation with defendant in regard to the boundaries of the property before the contract was signed; that she told him she owned from the fence on the southerly side to the apartment house on the northerly side, and that she had 173 feet; that after the contract was negotiated, but before it was signed, he made a down payment of \$100 to the vendor's husband and received a receipt describing the property as No. 1169 Boston road and giving the frontage as 173 feet by 165 feet in depth "more or less;" that at the time the contract was

signed he had a conversation with defendant's husband in respect to the meaning of the words "said dimensions being more or less" contained therein; that the contract was made out with a description of 171 feet 3 inches, and that there was a conversation in regard to the variance in such description in the contract and the deed, the substance of which was that he said he would accept a deed conveying 171 feet, but that if it fell below that measurement he would not buy the property; that the attorney for defendant thereupon said that what was meant by the words "more or less" was a difference of an inch or an inch and a half, and this last statement is not contradicted.

A surveyor, called by plaintiff, testified that the Findlay map had been generally accepted and adopted by civil engineers and surveyors as a correct map of the block between One Hundred and Sixty-seventh and One Hundred and Sixty-eighth streets and vicinity; that the iron pipe fence on the southerly side of lot No. 133 was in the same position as the old fence between lots 133 and 134, as shown upon the Findlay map; that, according to a survey made by him, the frontage actually occupied by the defendant on Boston avenue was 171.23 feet, commencing 229.22 feet southerly from the southerly line of One Hundred and Sixty-eighth street. The additional 1.23 feet not included in those descriptions which specified the frontage as 170 feet must be to the north, as there was no question but that the southerly boundary, as the land is occupied, is in accordance with the correct line between said lots 133 and 134. The surveyor for plaintiff gives the distance from that boundary line to the present southerly line of One Hundred and Sixty-eighth street as 400.45 feet — the surveyor for defendant does not differ with him materially on this point — which indicates that there is a surplusage of about 3 feet in lots 124 and 133, because the aggregate frontages of those lots as given on the Findlay map is 407.5 feet, and 10 feet have since been taken to widen One Hundred and Sixty eighth street, which would have according to the Findlay map been only 297.5 feet. Plaintiff's surveyor further testified that, taking the starting point as 229.22 feet south from One Hundred and Sixty-eighth street, which he found to be the proper starting point and which is substantially the distance given in the second deed tendered — 229.24 — a strip of land 1.58 feet in

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width would still be left between defendant's northerly line and the wall of the flat or apartment on the north, making the distance from the southerly line of lot 133 to said wall 172.81 feet.

A surveyor called by defendant testified that there was a surplusage in the block between One Hundred and Sixty-eighth and One Hundred and Sixty-seventh streets of 2.14 feet, which, if divided *pro rata* between the lots in the block, excluding the 35 feet, the parcel in question, the 170 feet frontage, would receive  $\frac{1.4}{1.4}$  of a foot; that he did not know that any apportionment of the surplusage had ever been made; that the actual distance between the brick wall on the north and the pipe line fence on the south was 172.70 feet, and in effect, that this entire frontage between the wall on the north and the fence on the south was in possession of defendant. He also testified that the actual distance from One Hundred and Sixty-eighth street to the starting point of the defendant's property, as fixed by his measurements, was 228.14 feet, and that, therefore, the description in neither deed tendered to plaintiff was correct, as the first gave this distance as 239.24 and the second just 10 feet less.

The defendant did not plead title by adverse possession, and, as already appears, at the time she tendered the deeds to plaintiff no claim was made of adverse possession of the additional 1.25 feet over the 170 feet. Defendant was permitted to show, over objection and exception duly taken by plaintiff that it was not within the issues, that James Whealen occupied the premises from the time he purchased, May 31, 1884, until he sold them to the defendant in 1892; that the only interference with the fences during the time he lived there was that part of a picket fence which was leaning over was straightened and repaired without affecting the fence line. The husband of the defendant also testified that he had lived in the house on the premises with his wife continuously since she purchased from Whealen in 1892, and that there had been no change in the fence lines except that some of the posts were renewed, the old holes being used; that the property was inclosed when she purchased it and was inclosed at the time of the trial, and that when the contract was signed the attention of plaintiff's assignee was called to the fact that the measurement was not given the same as in the receipt, and he replied that it was all right.

The court found, in effect, that on the date for closing the contract defendant had good title and was ready, willing and able to perform, and duly tendered performance, and that neither plaintiff nor his assignor was ready or willing to perform but refused to perform the contract. The view taken by the trial court, as indicated in the opinion, was that defendant had title to  $1\frac{7}{8}$  of a foot, in addition to the 170 feet, by reason of the surplusage in the block, and that the question presented was whether plaintiff should be relieved from accepting title to the lot with a frontage of 170.74 instead of 171.25, the dimensions of frontage in the contract, notwithstanding the insertion therein of the words "more or less."

*Gustavus A. Rogers*, for the appellant.

*Hugo Hirsh*, for the respondent.

LAUGHLIN, J.:

The evidence with respect to the understanding of the parties as to the meaning of the words "more or less" was, of course, incompetent in an action based on the contract as it stands. The evidence shows good record title in the defendant to the southerly 170 feet of the premises described in the contract and in the second deed tendered by her. The testimony of the surveyor called by the defendant, that the description in neither deed was correct, owing to the fact that he located the defendant's northerly boundary line 228.14 feet southerly from the southerly line of One Hundred and Sixty-eighth street, which is not the boundary line described in either deed tendered, manifestly is to be construed as indicating that in his judgment, owing to the surplus land in the block over the frontage given in the Findlay survey, the defendant owns 1.1 feet more than 171.25 feet, because the surveyors do not disagree about the southerly line, and, therefore, if defendant's northerly line commences 228.14 feet from the southerly line of One Hundred and Sixty-eighth street she should own 172.36 feet. As shown in the statement of facts, there is no conflict in the evidence with respect to the location of the southerly boundary line of lot 133. All concede that that line is fixed and established and corresponds with the fence constructed thereon. It thus appears, without controversy, that defendant had good record title to 170 feet, and that she was in possession of 171.25 feet or more. The evi-

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dence clearly shows a surplusage in frontage between the southerly line of lot 133 and the southerly line of One Hundred and Sixty-eighth street of several feet over the measurements shown on the Findlay map. Without the presence before the court of the owners of the northerly 35 feet of lot 133 and of lot 124, the ownership of this surplusage cannot be authoritatively adjudicated. It may be that the construction of the brick wall and building constitute a practical location of the line between the defendant and the abutting owner on the north. The evidence is not sufficiently definite to establish title to this surplusage by adverse possession; but it renders it highly probable that defendant would be entitled to at least 1.25 feet of the surplusage, if not more, and that she has been in possession thereof such a length of time that it is improbable that there will be any attempt to disturb her possession or that of her successor in interest. It is to be borne in mind that plaintiff's assignor purchased this parcel of land for a gross sum and that although there was uncertainty as to the frontage as is indicated by the fact that the description contained in the receipt first given gave the frontage as 173 feet, and that this was reduced to 171.25 feet when the contract came to be executed, and that even then the contract contains the express provision, referring to the measurements, "said dimensions being more or less." The defendant shows good record title approximately — and sufficiently in view of the form of the contract — to the amount of land specified in the contract; and it is reasonably certain that her possession of the remainder has ripened into title, or will ripen into title without molestation. There has been no fraud or misrepresentation. Plaintiff having withdrawn his demand for specific performance, stands before the court insisting that he was not obliged to accept the title, and that defendant is guilty of a breach of the contract. We are of opinion that defendant was not guilty of a breach of the contract, and that it was the duty of the plaintiff to take title. It follows that plaintiff was not entitled to recover the down payment or the costs and expenses of examining the title, and that the judgment should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

In the Matter of EMMELINE CARTIER, Appellant, v. WILLIAM R. SPOONER, Respondent.

First Department, March 22, 1907.

**Attorney and client — summary proceedings to compel attorney to pay over — reference to hear and determine not authorized.**

In a summary proceeding on a petition of a client to compel an attorney to pay over moneys the court must determine the controversy, and a reference is merely for the purpose of assisting the court.

Such referee has no power to hear and *determine*, and even when by error authorized to determine, no judgment can be entered except by direction of the court.

Section 1228 of the Code of Civil Procedure, providing for the entry of judgment upon the report of a referee, has no application to such special proceeding.

A motion to set aside a judgment in such proceeding erroneously entered on the report of a referee without confirmation by the court is not governed by section 1282 of the Code of Civil Procedure requiring that a motion to set aside a judgment must be made within one year from its entry, nor are the provisions of sections 1290 and 724 of the Code applicable.

APPEAL by the petitioner, Emmeline Cartier, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of January, 1907, denying the petitioner's motion to set aside a judgment entered in said clerk's office on the 19th day of December, 1905.

*Leon Lauterstein*, for the appellant.

*William R. Spooner*, in person, respondent.

HOUGHTON, J. :

In April, 1904, the respondent, as attorney for the petitioner, collected for her from a benevolent life insurance order a claim of \$3,000. In August following proceedings were begun by petition and order to show cause to compel the respondent to pay to the petitioner such money, and \$1,963.21 was paid to her, the respondent retaining the sum of \$1,036.79 as his fees and disbursements. The retention of this sum was not satisfactory to the petitioner, and the proceeding resulted on the 24th day of February, 1905, in an

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order of reference to determine whether or not a proper sum had been retained. This order of reference provided that the referee should hear and *determine* the amount due. Hearing was had before the referee and on his report in favor of respondent, without application to the court or confirmation, judgment was entered on the 19th day of December, 1905, in the clerk's office of New York county, against petitioner for \$913.10, referee's and stenographer's fees, and execution directed thereon. On the 1st day of March, 1906, petitioner moved to set aside such report and for leave to file exceptions thereto. The motion to set aside was denied, and leave to file exceptions *nunc pro tunc* was granted. On the 2d day of January, 1907, the petitioner moved to set aside the judgment entered December 19, 1905, and from the denial of such motion this appeal is taken.

There is no authority for the entry of a judgment in a special proceeding of this character. The petitioner was a client of the respondent, an attorney of this court. He had moneys in his hands which, as attorney, he had collected for her, and upon which he had a lien for compensation for his services, measured in the absence of any specific legal agreement therefor by their fair value. Under the provisions of section 66 of the Code of Civil Procedure, the client, this petitioner, had the right to present her petition to this court to have the amount of such compensation and lien determined. Such a proceeding, instituted by petition, is not an action but is a special proceeding, and no formal judgment can be entered thereon. (*Ward v. Ward*, 67 App. Div. 121.)

The Supreme Court has inherent power over its attorneys at law to compel them to deal fairly with their clients, and if an attorney has in his hands moneys belonging to the client, collected by him as such attorney, upon which he has no lien for compensation, the court will deal summarily with him and enforce its payment as for a contempt. (*Matter of Bornemann*, 6 App. Div. 524; *Matter of Langslow*, 167 N. Y. 314; Code Civ. Proc. §§ 14, 2266 *et seq.*)

Section 1228 of the Code of Civil Procedure, providing that judgment may be entered upon the report of a referee, has no application to a special proceeding instituted as this was, notwithstanding the provisions of the order that the referee should hear and determine the matter. That section appears in chapter 11, and under

title 1 of such chapter, which is entitled "Judgment in an action." In the present case there was no action, and notwithstanding the provisions of the order, it was necessary that the referee's report be presented to the court for confirmation, and upon such motion the court was called upon to exercise its judgment and confirm or reject it and decide the matter for itself.

In a proceeding of this character the court must determine the controversy, and it may order a reference only for the purpose of assistance to itself in that regard. It cannot shift the whole matter to a referee. If a reference be ordered, the matter must come back to the court on the report of the referee for final determination, and the report may be adopted or disregarded and a different decision made on the facts. (*Matter of Ney Co.*, 114 App. Div. 467; *Marshall v. Meech*, 51 N. Y. 140.)

Such being the proper practice of the court, the order, although in form to hear and determine, must be deemed to be the order which the court had the right to make and must be considered as an order to hear and report. (See *McCleary v. McCleary*, 30 Hun, 154; *Bantes v. Brady*, 8 How. Pr. 216.) The respondent having obtained from the referee a report in his favor should have presented it to the court for confirmation instead of entering judgment thereon as was done.

It is insisted, however, that the appellant is too late in making her motion to set aside the judgment, in that she did not move within one year from its entry as prescribed by section 1282 of the Code. That section relates to the setting aside of judgments for irregularity, and provides that such motions shall not be made after the expiration of one year from the filing of the judgment roll. The entry of judgment herein was not an irregularity. It was a nullity because there was no authority for its entry.

We do not think the petitioner's motion came within the provisions of the above section or within the provisions of sections 1290 or 724 of the Code. But if it did, the court has inherent power over its judgments and is not limited by the provisions of those sections (*Furman v. Furman*, 153 N. Y. 309; *Ladd v. Stevenson*, 112 id. 325), and the present instance is a case in which that power should be exercised in the furtherance of justice. All the facts are not before us, but, so far as they appear, both the expenses of the



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reference and the compensation of the attorney are unreasonably large. On a presentation of the report of the referee to the Special Term for confirmation, however, the whole matter can be determined.

The order must be reversed, with ten dollars costs and disbursements, and the motion to set aside the judgment granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

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EDWARD DWYER, Respondent, v. JOHN SLATTERY, Appellant.

First Department, March 22, 1907.

**Negligence — injury through blasting — bill of particulars granted.**

The granting of a bill of particulars does not depend upon the actual facts or the knowledge of the opposite party concerning them, but is dependent upon the facts claimed to exist. The purpose of a bill of particulars is to amplify the pleading and to indicate more particularly the nature of the claim in order that surprise at trial may be avoided.

When a servant is injured by a blast through the alleged negligence of the master, and the complaint alleges his negligence and that of his agents or servants and the failure to make and enforce proper rules, the plaintiff should be compelled to furnish a bill of particulars stating whether the blasting was under the personal charge of the defendant at the time of the accident, or in charge of an employee, with his name or a description of him and his duties, and in what negligent manner the blast was fired, or from what negligent cause, and what rules should have been made or what existing rule was disregarded.

APPEAL by the defendant, John Slattery, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of December, 1906, denying the defendant's motion for a bill of particulars.

*William F. Clare*, for the appellant.

*Louis M. Sonnenberg*, for the respondent.

HOUGHTON, J.:

The action is by an employee to recover for injuries alleged to have been caused by the negligence of the employer in the conduct and management of blasting an excavation for a building.

The complaint alleged, in general terms, that plaintiff was hit by flying rock and splinters scattered by the explosion through the carelessness and negligence of the defendant and his agents or servants, and particularly because of the failure of defendant to make and enforce proper rules for the safe conduct of such work and by the negligence of the person employed by the defendant to superintend the same.

The defendant moved that the plaintiff furnish a bill of particulars setting forth his claim as to whether the defendant was personally in charge of the work or whether it was in charge of a servant, and if so, who such servant was or what position he occupied, and in what particular the blast was improperly fired, and of what the negligence therein consisted and what rules should have been made for the greater safety of the work.

The motion was denied and the order of denial is attempted to be sustained on the ground that the defendant knew as much about the cause of the accident as the plaintiff, and possibly more.

This answer does not meet the situation. The question in applications of this kind is not what may have been the actual facts, nor the knowledge of the opposite party concerning them, but rather what the aggrieved party claims them to be. What they are claimed to be is the issue that is to be met and tried, and where the pleading is not specific in this regard a bill of particulars is properly ordered to point out such claims and thus make definite the issues to be litigated. It is not the office of a bill of particulars to expose to his adversary the evidence of the party giving it. The purpose of such a bill is to amplify the pleadings and to indicate with more particularity than is ordinarily required in a formal plea the nature of the claim made in order that surprise upon the trial may be avoided and that the issues may be more intelligently met. (*Slingerland v. Corwin*, 105 App. Div. 310.)

We think the defendant was entitled to know what the plaintiff will claim upon the trial respecting the following matters: Whether the work of blasting was under the personal charge of defendant at

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the time of the accident or in charge of an employee, and his name or a description of him and his duties; in what claimed negligent manner the blast was fired, or from what claimed negligent cause; what rules should have been made for blasting or warning, or what existing rule was disregarded temporarily or habitually. To this extent the order for a bill of particulars should have been granted.

The order is reversed, without costs, and the motion granted as indicated, without costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Order reversed, without costs, and motion granted as indicated in opinion, without costs. Settle order on notice.

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**MATTHEW CURRAN, Respondent, v. MANHATTAN RAILWAY COMPANY,  
Appellant.**

First Department, March 22, 1907.

**Negligence — common-law rules obtain unless action brought under Employers' Liability Act — erroneous charge as to neglect of foreman employed to give warning.**

An employee in order to obtain the privileges of the Employers' Liability Act must bring his action thereunder. If he sue at common law, the common-law rules are applicable.

Hence, when in a common-law action it is shown that the master employed a foreman to warn laborers working upon a railroad track of the approach of trains, and that the plaintiff, an employee, was injured during a temporary absence of the foreman, it is error to charge that the foreman was the *alter ego* of the master and that his neglect was that of the master and not that of a fellow servant, when no question is raised as to the competency of the foreman.

By furnishing a competent foreman to give warning, the master performed his duty and was not liable for the negligent acts of the foreman in the management and detail of his work.

*Ward v. Manhattan Railway Co.* (95 App. Div. 437), limited.

APPEAL by the defendant, the Manhattan Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on

the 17th day of April, 1906, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 17th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

*J. Osgood Nichols*, for the appellant.

*James A. Douglas*, for the respondent.

HOUGHTON, J. :

The plaintiff was a track repairer in the employ of defendant and his duties required him to work on its elevated structure, around and between the railway tracks upon which trains were being operated. In charge of the gang with which plaintiff was working was a boss or foreman named McEwen, and a part of his prescribed duties was to warn the workmen, when on the track, of approaching trains. At the time of the accident the foreman was temporarily absent from the place where plaintiff was working, and no warning was given plaintiff by him and he was struck by a passing train, while at work, and received the injuries for which he complains.

The plaintiff had been engaged in this kind of work for several months, and testified that it was the custom for the foreman to give warning of an approaching train, and he manifestly relied upon the fact that such warning would be given to him.

By the charge of the court all questions respecting the negligence of the defendant were taken from the jury except that of the foreman, McEwen, in failing to perform his duty of giving warning of an approaching train. As to the foreman the court charged that respecting his duty to give warning so that a reasonably safe place might be provided for the plaintiff in which to perform his work, he stood in the place of the master and was its *alter ego* and that his neglect in that regard was that of the defendant, and refused to charge that such neglect in failing to give warning was the neglect of a fellow-servant.

This instruction was erroneous. The action is not under the Employers' Liability Act (Laws of 1902, chap. 600), but at common law, and it must be tested by the rules applicable to such an action.

Under the law of the case as enunciated by the trial court no

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question remained for the jury to determine except whether or not the foreman, McEwen, was negligent in not giving warning of an approaching train. No question was raised as to the competency of McEwen to perform his duties, and it must be assumed that he was a competent man for the position. Under the facts appearing the master fully performed its duty to plaintiff by furnishing such competent foreman to give the necessary warning.

The giving of warning of approaching danger by a foreman to a gang of workmen is a detail of the work of the master. (*Ryan v. Third Avenue R. R. Co.*, 92 App. Div. 306; *Riola v. N. Y. C. & H. R. R. Co.*, 97 id. 252.) At common law the master is not liable to his employee for the negligent acts of a superintendent in the management and detail of the work. Although the superintendent is of a higher degree than the one injured, he is still a servant as to the detail and management of the work, and not the *alter ego* of the master and his negligence in those respects is the negligence of a coservant for which the master is not responsible. (*Loughlin v. State of New York*, 105 N. Y. 159; *Cullen v. Norton*, 126 id. 1; *Ryan v. Third Avenue R. R. Co.*, *supra*.) It was to relieve from the harshness of this rule that the Employers' Liability Act was enacted by the Legislature. (*Bellegarde v. Union Bag & Paper Co.*, 90 App. Div. 577; *affd.*, 181 N. Y. 519; *Gmaehle v. Rosenberg*, 178 id. 147.) To obtain the privileges of that act, however, the action must be brought under it and not for common-law negligence. An employee cannot bring his action under the act and without amendment of his complaint recover upon a common-law cause of action, nor can he bring it at common law and recover under the act. (*Davis v. Broadalbin Knitting Co.*, 90 App. Div. 567; *affd.*, 185 N. Y. 613; *Chisholm v. Manhattan Railway Co.*, 116 App. Div. 320.)

In *Ward v. Manhattan Railway Co.* (95 App. Div. 437) this court made the observation that as it then construed the Employers' Liability Act the provisions of sections 1 and 2 could not be taken advantage of except the action was brought under the act, but that the provisions of section 3, respecting the assumption of risks, applied to all actions by an employee against his employer, whether under the act or at common law. Further consideration has led us to conclude that in order to entitle an employee to the

benefit of the provisions of the Employers' Liability Act he must bring his action under that act and conform to its terms in so doing (*Chisholm v. Manhattan Railway Co.*, *supra*), and that in an action for common-law negligence he is not entitled to the benefits of its provisions, but must be governed by the rules of the common law.

The Employers' Liability Act is not an abridgment of the rights of an employee against his employer as they existed at the time of its passage. Such rights as he had at common law still exist, and the act has added other rights of action which he may take advantage of if he conforms to the provisions of the statute. (*Gmaehle v. Rosenberg*, *supra*; *Bellegarde v. Union Bag & Paper Co.*, *supra*.) The present action having been brought under the common law, its rules apply, and for the error pointed out the judgment must be reversed and a new trial granted.

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

SECURITY WAREHOUSING COMPANY, Respondent, v. THE AMERICAN  
EXCHANGE NATIONAL BANK, Appellant.

First Department, March 22, 1907.

**Conversion — use of corporate check by officer for individual debt — novation — acceptance of obligation of third person in settlement of claim — satisfaction by one joint tortfeasor discharges others.**

Although the president of a corporation has used the check of the corporation to pay a personal debt due the defendant, the corporation is not entitled to recover the money represented by the check when it has waived the tort of its president, has treated the debt as a claim against him, and has accepted in payment thereof the obligations of a third party adequately secured.

When a corporation accepts the obligation of a third party in settlement of the claim against its president for the unauthorized use of a corporate check, there is a novation and it can thereafter look only to the substituted debtor for reimbursement.

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A party can have but one satisfaction for a wrongful act; full satisfaction by one joint tort feisor discharges the others.

Hence, a corporation by accepting the obligations of a third party in settlement of its claims for the tort of its president in misapplying the corporate check has had satisfaction from one joint tort feisor and cannot recover against the other who received the check, whether the latter were a *bona fide* holder or no

APPEAL by the defendant, The American Exchange National Bank, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of August, 1906, upon the report of a referee.

*Benjamin N. Cardozo* [*Edgar J. Nathan* with him on the brief], for the appellant.

*Edwin B. Smith*, for the respondent.

HOUGHTON, J. :

On the 15th day of December, 1902, Messrs. Greig, Goodrich and Dresser were three of the fifteen directors of plaintiff. Greig was president and Goodrich vice-president, and both were members of the executive committee of five, of which one Driggs was chairman. Greig, Goodrich and Dresser were indebted to the defendant upon a loan of \$75,000 secured by 500 shares of stock of the Trust Company of the Republic. On the day specified, Greig directed the secretary of plaintiff to draw a check upon its funds, payable to Greig's order, for the sum of \$22,500, for the purpose, as was stated, of buying stock of the Trust Company of the Republic. This was done, and signed by Greig as president and countersigned by the secretary and indorsed to the defendant, which accepted it in reduction of the Greig, Goodrich and Dresser loan, surrendering 150 shares of the collateral stock. Thereupon these three individuals executed a note to the plaintiff, payable in four months, pledging such 150 shares as collateral security for its payment.

The plaintiff had a surplus of funds which it invested. At an appointed meeting of the executive committee on January 28, 1903, at which it does not appear that any one attended save Greig and Driggs, the chairman, Greig submitted to the chairman a statement of the outstanding loans and investments, showing in the neighborhood of \$140,000 loaned or invested, besides the amount in controversy. The chairman inquired concerning the note of \$22,500 secured by the collateral, and when it was explained to him he

objected to it on the ground that it was a time loan, and that the transaction was in the nature of banking business, which the plaintiff was not authorized to transact. Thereupon, Greig assured the chairman that he would see that the loan was taken up.

Between this time and the meeting of the twentieth of March following, at which at least four of the executive committee were present, together with the counsel of the plaintiff, the president had negotiated a loan from the plaintiff to one Hunt of \$21,000, taking his demand note therefor, with 140 shares of the Trust Company of the Republic and 100 shares of the International Bank and Trust Company pledged as collateral, taking up the note of himself and associates therewith, and he reported to the committee at that meeting that the loan of \$22,500 which had been objected to, had been paid.

It appears that ten shares of the stock of the Trust Company of the Republic had been then, or were subsequently, sold and \$1,500 turned in to the plaintiff.

On the sixth of April following, the Hunt loan was again discussed and additional collateral resolved to be called for, and at a special meeting of the directors held on the sixteenth of the same month, the president reported that, in pursuance to instructions from the executive committee, he had asked and received from Mr. Hunt fifty shares more of the International Bank and Trust Company's stock as collateral. At another meeting of the directors on the thirtieth of that month, the secretary read a report of a special auditor of the books of plaintiff, which set forth the loan to Hunt and did not contain the original loan to Greig and his associates.

During the months of April, June and July, 1903, the plaintiff, through its secretary, and by direction either of its board of directors or the executive committee, had correspondence with Hunt demanding additional security or the payment of the loan, and threatening legal prosecution, which resulted in the increasing of the collateral to 200 shares of the International Bank and Trust Company stock in addition to the 140 shares of stock of the Trust Company of the Republic. This for the time being, seems to have been satisfactory to the plaintiff, after it had made inquiry as to the market value of the International Bank and Trust Company stock, which was selling above par.



The Hunt loan in the various resolutions and communications is mentioned indifferently as \$22,500 and \$21,000; but it is conceded that \$21,000 is the proper figure.

In October following there was a change in the management of plaintiff, and a new president was elected and a new executive committee was appointed. After various consideration and discussion the new executive committee authorized Mr. Barker, one of its members, to negotiate with Hunt for the extension of the time of payment of his note to two or three years, if in his judgment it seemed for the best interests of the company so to do. These negotiations resulted in a written agreement, dated the 30th of December, 1903, between Hunt and the plaintiff, which recited the giving of the note, no part of which had been paid and that there was \$22,022 due thereon, and provided as follows: "Now therefore, in consideration of the premises and the further consideration of one dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, it is agreed that the party of the first part shall pay interest on the sum of \$22,022, his present indebtedness to the company, in semi-annual payments, on the 1st day of July and January, beginning on the 1st day of July, 1904, at the office of said company, at the rate of five per cent per annum; and the said company agrees that so long as payment of said interest is regularly made at the times and in the manner above set forth, it will refrain for the space of three years from the date hereof, from making any further demand, and from taking any legal proceedings against the party of the first part, to enforce the payment of the amount now due."

During the summer of 1903, and presumably up to the time of the agreement of December thirtieth, the market value of the collateral to the Hunt note exceeded its amount, with interest, and at one period of that time such value was some \$12,000 in excess thereof.

Although the check for \$22,500 was returned to plaintiff in January, 1903, it is claimed its form did not come to the attention of the board of directors of plaintiff until the latter part of October of that year. On the 1st day of February, 1904, the plaintiff demanded that the defendant return to it the \$22,500 represented by the check which Greig had given it on the ground that upon its

face there was notice that the moneys did not belong to Greig, and that he could not lawfully apply them to his individual debt. This demand was not complied with, and in March following the action was brought.

Pending the action the 140 shares of stock of the Trust Company of the Republic, which had been exchanged for stock of the Commonwealth Trust Company, were sold for \$4,200, and on the trial the plaintiff conceded that this sum should be deducted, as well as the \$1,500 which it had received when the Hunt note was given; and although protesting that under the form of the action which it had brought, it was not obliged so to do, it tendered to defendant the Hunt note with the remaining collateral therefor.

We cannot concur in the conclusion of the learned referee that the defendant is liable, under the facts disclosed, to return to the plaintiff the moneys which it received through the check. Conceding that the form of the check was such as to give the defendant notice that the moneys represented by it did not belong to Greig, but were those of the plaintiff, and that Greig had not authority to use the money of the plaintiff in the manner in which he did, we are of the opinion that the plaintiff so dealt with the unauthorized act of Greig that it lost whatever right it had against the defendant. Even if Greig had no authority to loan the money to himself and his associates, and the taking of it by him was a conversion, still the plaintiff could waive the tort and treat the claim as a debt against him. If Greig paid the debt or restored the money, plaintiff then had no claim against defendant. The action is for conversion. The defendant is not liable unless Greig was also liable. A party injured can have but one satisfaction for the wrongful act, and a full satisfaction from one joint tortfeasor operates as a discharge of all the others. (*Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628.) If Greig paid a part and gave the obligation of a third party, accepted in payment by defendant for the balance, this was as much a payment as though the whole amount had been paid in cash. This was precisely what was done. There can be no doubt that the directors and officers of the plaintiff knew that the note of Hunt for \$21,000, with its collateral, \$1,500 in cash having been paid, stood in place of the \$22,500 note of Greig, Goodrich and Dresser, which had been given for the check.

Nor can there be any doubt that they knew that the prior note had been taken up by the new arrangement and assented to its being so treated and the referee expressly found that the Hunt transaction operated as a payment of the former obligation. A novation was thus effected and plaintiff could thereafter look to the substituted debtor only for reimbursement. If the note of a third person is given at the time an obligation is entered into the presumption is that such note was accepted in payment, and the burden is upon the one accepting to show that it was not thus received. (*Gibson v. Tobey*, 46 N. Y. 637.) If the note of a third person be given for a past indebtedness, the burden is upon the person giving it to establish that it was accepted in payment. (*Noel v. Murray*, 13 N. Y. 167.) Even if the latter rule applies, the defendant met the burden of proof for every fact goes to show that the note of Hunt was accepted in payment of the prior obligation of Greig and his associates. Additional security was continually demanded until the collateral became so satisfactory that afterwards the new board of directors and officers of plaintiff, knowing all the facts, entered into an agreement to extend the time of payment of the note for three years, and, if the maker desired for five years, provided the interest was promptly paid. The result of what was done was that plaintiff not only ratified the loan to Greig, and treated it as such, but accepted in payment of it thereby discharging it, an obligation supposed to be entirely secure and highly satisfactory as evidenced by the extension of time given.

In addition, the plaintiff did not act with such promptness, after knowledge of the situation, as the law required. As early as January, 1903, probably at least as early as March and April, 1903, the plaintiff fully understood all the facts in relation to the \$22,500 check, except perhaps what bank had cashed it, and it might have ascertained that fact by looking at the check which had been returned to it early in January of that year.

If the defendant was bound to restore the money it was at least entitled to receive back the 150 shares of Trust Company of the Republic stock which it had surrendered. At that time this stock was worth at least \$150 per share, for ten shares appear to have been sold for \$1,500. So too, in October following, when the plaintiff's officers knew that the defendant cashed the check and

applied the proceeds to the indebtedness of Greig and his associates the stock must have continued to have some value for the plaintiff was satisfied with it as collateral security.

Even if the plaintiff was not obliged earlier to ascertain all the facts, it should have acted promptly in October when it was fully apprised of them. In omitting so to act it not only continued to ratify the acts of its former president by its silence, but it failed to perform its duty to the defendant by reducing the damages which it might suffer as much as it was able.

We have not considered the point urged by the appellant, that the defendant was a *bona fide* holder of the check, because it was signed by the secretary as well as the president, for we have concluded that whether the defendant was a *bona fide* holder or not, it is not liable to the plaintiff.

The judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

PATTERSON, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

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ADELIA A. HASSELL, Individually and as Sole Executrix, etc., of  
BENTLEY D. HASSELL, Deceased, Respondent, v. LEANDER J.  
BUCKLEY, Individually and Doing Business under the Firm Name  
of L. J. BUCKLEY & COMPANY, Appellant.

First Department, March 22, 1907.

**Judgment**—interlocutory judgment, how construed—contract to pay percentage of commissions earned through recommendation of plaintiff.

Ordinarily the affirmance of an interlocutory judgment establishes the law respecting the final judgment, but where the interlocutory judgment is ambiguous it will not be so interpreted as to do manifest injustice.

Thus when the plaintiff sues for an accounting whereby the defendant agreed to pay the plaintiff's testator one-half of the commissions received by the defendant as purchasing agent so long as the testator succeeded in inducing the principal to employ the defendant, an interlocutory judgment that the plaintiff was entitled to an accounting for one-half of all the commissions received by the defendant should not be so construed as to mean that the latter was

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liable for commissions on sums earned under a subsequent specific contract of employment by the principal, with the procuring of which the plaintiff's testator had nothing to do.

(Per INGRAHAM, J.): The interlocutory judgment should only be construed as a decision that the defendant account, and not as establishing the amount of the recovery.

APPEAL by the defendant, Leander J. Buckley, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 7th day of September, 1906, upon the report of a referee, with notice of an intention to bring up for review upon such appeal an interlocutory judgment entered in said clerk's office on the 19th day of December, 1904, directing the defendant to file his accounts.

*John A. Straley*, for the appellant.

*H. H. Snedeker*, for the respondent.

HOUGHTON, J.:

The appeal is from a final judgment in an action for an accounting respecting commissions received by defendant as purchasing agent for certain Cuban railway companies.

Plaintiff's testator was purchasing agent for these corporations, and on the 12th day of March, 1900, he transferred such business to defendant on the agreement that he should be paid one-half the commissions received by the defendant during the continuance of such contract as the plaintiff's testator might succeed in inducing the companies to enter into with defendant to act as purchasing agent for them. Plaintiff's testator died shortly after this agreement was made, but through his efforts the companies designated defendant as purchasing agent temporarily, and the employment so continued without any specific contract until April 9, 1903, when a special contract was entered into by them with defendant. With this latter contract plaintiff's testator, of course, had nothing to do, aside from the fact that he had before his death brought the defendant and the companies together and had induced the companies to enter into relations with defendant, of an indefinite character, which had continued until the specific contract was entered into.

On the 19th of December, 1904, the plaintiff obtained an inter-

locutory judgment for an accounting which, in connection with the findings upon which it was based, might be construed as adjudging that the plaintiff was entitled to an accounting for one-half of all commissions received by defendant from the Cuban companies from March 12, 1900, to the time when defendant ceased to act as purchasing agent for them, however long that might be and by whatever contract with them he should so act. On appeal to this court that judgment was affirmed without opinion. (104 App. Div. 630.)

Of course, under ordinary conditions, an interlocutory judgment passed upon by this court establishes the law of this court respecting the final judgment. Where, however, as in the present case, there is some ambiguity as to its provisions it will not and ought not to be interpreted so as to do manifest injustice.

The contract of April 9, 1903, not having been procured by the plaintiff's testator, the accounting should have proceeded only to the date of that contract. The allowing to plaintiff of one-half the net commissions earned by defendant up to that time is a liberal interpretation of defendant's contract and all that should be permitted. From the account filed on the hearing before the referee there can be no difficulty in ascertaining the amount of the net commissions earned by defendant up to April 9, 1903, and the judgment should be modified by allowing such commissions to that time only and by striking out the provisions of the judgment that plaintiff is entitled to any accounting subsequent to that date, and as so modified the judgment should be affirmed, without costs.

PATTERSON, P. J., McLAUGHLIN and CLARKE, JJ., concurred.

INGRAHAM, J. :

This action was referred to a referee to hear and determine. The referee filed a report directing an interlocutory judgment which required the defendant to account for the commissions that he had received from certain Cuban railways, and upon that report an interlocutory judgment was entered which was affirmed by this court. The cause of action sought to be enforced was based upon an agreement between the plaintiff's testator and the defendant and the relief asked was that the defendant "make and render his account of moneys received by him as aforesaid and for his actions as trustee as aforesaid;" that "upon the completion of said account-

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ing he be decreed to pay over to this plaintiff such sum as shall be ascertained to be due her from said defendant."

The interlocutory judgment ordered and adjudged "that the defendant within twenty days after service of a copy of this judgment do account to the plaintiff and file his accounts herein, setting forth in separate items the amount of commissions received or entitled to be received by the defendant individually or the firm of L. J. Buckley & Company since March 12th, 1900, as purchasing or shipping agents for the Western Railway of Havana, Limited, and the Cuban Central Railways, Limited, and either of them;" that the question whether the defendant should pay over to the plaintiff one-half of the gross or one-half of the net profits should be left open for further evidence. There was no adjudication until the accounting took place as to the amount that was due to the plaintiff from the defendant, or the commissions that the defendant received from these Cuban railways that were embraced within the contract between the plaintiff's testator and the defendant. The judgment quite properly required the defendant to file his accounts of such commissions, and the amount of the commissions with the date of their receipt being before the referee, he could then on the accounting determine the amount due under the contracts from the defendant to the plaintiff. Upon an appeal from the interlocutory judgment which merely required the defendant to file his accounts, this court was not called upon to pass upon the question as to the period during which the plaintiff would be entitled to recover, or the amount of the recovery, and the affirmance of the interlocutory judgment was not an adjudication that the plaintiff would be entitled to recover for all the commissions that the defendant had received or would in the future receive from these Cuban railways. What the interlocutory judgment determined, which determination we affirmed, was that the defendant should be required to file the accounts; the amount of recovery, including the period during which the defendant would be chargeable with one-half the commissions received and the amount of the commissions to be determined on the accounting. The referee proceeded with the accounting and made and filed his final report. By this final report he decides that "under the agreement between the defendant and said Bentley D. Hasell, defendant obligated himself

to pay one-half of the net profits, when realized by him, in the conduct of said business, and not one-half of the gross profits thereof;" that the defendant had received commissions in the accounts involved in this action from the 12th of March, 1900, to and including July 31, 1905, amounting to the sum of \$16,721.52; that there were certain allowances to which the defendant was entitled for expenses of conducting the business and that the defendant was entitled to be credited with certain money that he had paid in settling up the business affairs of the plaintiff's testator after his death, and that by the adjustment of this account there was a balance due to the plaintiff of \$2,738.36, and judgment was, therefore, directed for the plaintiff for that sum, which judgment provided that the plaintiff might from time to time apply to the court at the foot of the judgment for a further accounting of the commissions subsequently received, and final judgment was entered in conformity with this report.

From the evidence it appeared that on March 12, 1900, the plaintiff's testator had for some time acted as purchasing agent of certain Cuban railroads; that immediately prior to March twelfth his health had broken down so that he was unable to continue such business. He stated to the defendant, then doing business under the name of L. J. Buckley & Co., that he had a contract by which he was purchasing and shipping agent of certain Cuban railroads, and applied to the defendant to undertake the continuance of this business under the terms of this contract with these railroads, the defendant to pay to him one-half the commissions paid by the said railways; that he would aid defendant in every way to obtain a contract with said railway companies upon terms similar to their contract with him, it being understood that defendant is to pay to his order or to whom he may designate one-half the commissions the defendant would receive from said railways. This agreement to continue during the term that a contract may be entered into between defendant and said railways, and this proposition was accepted by the defendant. The plaintiff's testator then wrote to the railway companies stating the condition of his health; that he had transferred his business to the defendant, and asking that the contract be continued, and requesting that the company appoint the defendant his successor. In pursuance of this recommendation the



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railway companies on the twelfth of April addressed letters to the defendant stating that in view of the recommendation of Mr. Hasell, "We are disposed to leave the business that we have confided to his hands, in your hands temporarily, say until the end of this company's financial year, June 30th next, when the matter will be taken up definitely." Under this arrangement the defendant continued to act until April 9, 1903, when a new arrangement was made by which the defendant was to attend to the purchase of supplies for the railways, the defendant to do the work under the same terms and at the same rate of commissions that he had theretofore received; and it was further arranged that the defendant was to make payments on behalf of the companies if remittances did not reach him in time, he to receive interest at the rate of six per cent per annum upon the amount of his disbursements from the actual date of payment until remittances were received. After April 9, 1903, the business was transacted by the defendant under the new contract and has so continued to the present time. The referee allowed one-half commissions received from April, 1903, down to the date of his report, and I think this was error. The plaintiff's testator died on the 29th day of May, 1900, a little over two months after the arrangement was made. The agreement under which the parties acted was that the plaintiff's testator was to aid the defendant in every way to obtain a contract from the railways, and in consideration of this transfer of the business and the services of the plaintiff's testator the defendant was to pay to him "one-half ( $\frac{1}{2}$ ) the commissions you would receive from said Railways. This arrangement to continue during the term that a contract may be entered into between yourselves and said Railways." It is thus clear that the arrangement was to continue during the period that a contract obtained through the testator's intervention should continue. A contract with the railway companies was obtained which was to last until the thirtieth of June of the same year, and before the term of that contract expired the plaintiff's testator died; but, as no new contract was made, but the business continued under this temporary arrangement, I think it may be said that so long as the arrangement continued under the contract which was obtained as a result of the application of plaintiff's testator to the railway companies, the arrangement was continued, and thus I think the plain-

tiff was entitled to one-half of all its commissions received down to the 9th of April, 1903, when the new contract was made between the defendant and the railway companies, and the defendant ceased to act under the contract which had been obtained at the solicitation of the plaintiff's testator.

I think, therefore, that it was error for the referee to include in a recovery any amount of commissions received by the defendant after April 9, 1903, and that the recovery should be limited to the amount received prior to that date. As it would appear that the amount can be ascertained from the accounts submitted by the defendant, the judgment should be modified by restricting the recovery to the amount due in accordance with this opinion, and the judgment, as modified, should be affirmed, without costs.

Judgment modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

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MEMPHIS TROTTING ASSOCIATION, Respondent, v. ELMER E. SMATHERS,  
Appellant.

First Department, March 22, 1907.

**Inspection of books and papers — when former order of inspection not a bar to subsequent application.**

When on a motion to obtain an inspection of an affidavit it appeared that two affidavits have been made in different cities and contain different allegations, the granting of a motion for the inspection of one affidavit is not *res adjudicata* requiring that an inspection of the other affidavit should be denied.

APPEAL by the defendant, Elmer E. Smathers, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of December, 1906, denying the defendant's motion to resettle an order entered in said clerk's office on the 28th day of November, 1906, which denied the defendant's motion for an inspection of a certain affidavit.

*John J. Adams*, for the appellant.

*John F. Cloonan*, for the respondent.

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PER CURIAM:

The motion for an inspection was denied by the learned court at Special Term upon the ground that the matter was *res adjudicata*. (*Memphis Trotting Assn. v. Smathers*, 114 App. Div. 376.)

When a motion for inspection was before this court upon the former appeal it appeared conclusively upon the record that the affidavit of which an inspection was desired had been destroyed and for that reason we affirmed the order denying the motion, but with leave to move for the inspection of a copy thereof. Thereafter a copy of said affidavit, purporting to have been made at Chicago, Ill., was furnished to the defendant and appears in the record. It is quite evident that there were two affidavits or depositions made by one Sanders in the possession of the attorneys for the plaintiff, the one verified in Chicago and now appearing in the record, and the other designated a deposition verified in St. Louis and bearing the signature of the deponent in writing. The copy of the affidavit furnished to the defendant did not contain the alleged details of the drugging of the mare Lou Dillon as read by one reporter from an affidavit in the possession of the plaintiff's attorneys, and, as is alleged by another reporter, as read to him over the telephone from the plaintiff's attorney's office.

This motion was made, not to obtain an inspection of the Chicago affidavit, the destruction of which had been established and a copy of which was in the possession of the defendant's attorney, but of the other or St. Louis deposition containing the details of the alleged drugging, and, therefore, it is evident that the denial of the motion upon the ground that the question was *res adjudicata* cannot be sustained.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the application for an order for the inspection of the deposition, or a copy thereof if destroyed, should be granted, with ten dollars costs.

Present—PATTERSON, P. J., INGRAHAM, McLAUGHLIN, CLARKE and HOUGHTON, JJ.

Order reversed, with ten dollars costs and disbursements, and motion granted as indicated in opinion, with ten dollars costs. Settle order on notice.

HARRY BROWN, on Behalf of Himself and All Parties Similarly Situated, Who Shall Come in, Appellant, v. UTOPIA LAND COMPANY, Respondent, Impleaded with JOSEPH BERKOWITZ and Others, Defendants. (No. 2.)

First Department, March 8, 1907.

**Pleading** — action against directors of corporation for accounting — failure to allege that defendants were directors — failure to excuse demand that corporation sue — misjoinder of actions — improper dismissal on merits.

A complaint in a stockholder's action alleging in substance that the defendants knowing the value of property sold to a corporation conspired to defraud the stockholders and in pursuance of the conspiracy obtained control of the majority of the stock by false representations, etc., which fails to allege that the defendants were the directors of the corporation, fails to state a cause of action against them, for by the statute directors only have power to manage the corporate affairs.

Such complaint is also subject to demurrer when it fails to allege that a demand has been made upon the corporation to bring action to recover for the wrongful acts complained of, or fails to state facts which excuse such demand.

Moreover, the plaintiff cannot in one complaint unite an action by him as a stockholder to compel an accounting by the directors for their official acts and a restitution to the corporation of moneys wrongfully received, with a personal action to recover damages sustained by the wrongful acts of the defendants.

In sustaining a demurrer the complaint should not be dismissed on the merits, unless by no possibility can the pleading be made good by amendment.

APPEAL by the plaintiff, Harry Brown, from a judgment of the Supreme Court in favor of the defendant, Utopia Land Company, entered in the office of the clerk of the county of New York on the 24th day of November, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, as resettled, sustaining the said defendant's demurrer to the complaint and dismissing the complaint upon the merits.

*Emanuel Hertz*, for the appellant.

*Emanuel Jacobus*, for the respondent.

McLAUGHLIN, J.:

The complaint in this action alleges, in substance, that the defendant corporation was organized for the purpose of buying

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and selling real estate, and in pursuance thereof made certain purchases for which it paid or agreed to pay upwards of \$100,000, of which sum a little over \$21,000 was contributed by the shareholders and the balance paid by taking the property subject to two mortgages; that the value of the property purchased at the time of the commencement of this action was between \$200,000 and \$300,000; that the defendants, other than the corporation, knowing the value of the property, entered into a conspiracy to deprive and defraud the plaintiff and a large number of shareholders of their property and the money paid for their respective stock, and in pursuance thereof they have obtained control of a majority of the shares of stock by representing to the plaintiff and others that the corporation, at the time such shares were obtained, was insolvent and unable to meet its obligations, and, unless they could obtain such shares, an application would be made for the appointment of a receiver; that also, in pursuance of such fraudulent scheme and to carry the same into effect, they ceased to collect moneys outstanding and due the corporation for land theretofore sold, amounting to some \$7,000, and that moneys collected were not credited in the books of the corporation; that the plaintiff, relying upon the representations made, entered into a certain agreement, but when it was ready for signature another was substituted, wherein and whereby the plaintiff and other shareholders surrendered to the defendants a majority of the shares of stock and all rights and privileges in the corporation for a period of three years; that with the power thus acquired, the defendants control the operations of the corporation to the exclusion of others, and put out one Klein and Greenspan as officers; that the defendant Harris, the secretary of the corporation, conspired with others to defraud the shareholders, and denied them access to the books or offices of the corporation, and refused to furnish any statements of its financial condition; that the defendants are familiar with the value of the land purchased by the corporation before referred to and have refused from \$1,100 to \$2,000 per acre; that they now control all but forty-five shares and have declared an intention of removing Klein, the vice-president, and Greenspan, a director, and all other directors who will not participate in the fraudulent scheme to deprive the shareholders of their money; that a large number of shareholders are thus deprived of

their rights and the corporation is prevented from carrying on its usual and ordinary business. The judgment demanded is (1) that the defendants and each of them account to the plaintiff and to all the shareholders similarly situated for their official conduct in the management and disposition of the funds and property of the corporation; (2) that the defendants and each of them be compelled to account to the plaintiff for any money and the value of any property they have acquired for themselves and transferred to others, or lost or wasted in the business of the corporation; (3) that the damage which the plaintiff has sustained by reason of the wrongful acts of the defendants be ascertained and that he have judgment therefor; (4) that the annual meeting of the shareholders of the corporation called for the 21st of January, 1906, and held on the 16th of February, 1906, be declared null and void, and that a receiver of the corporation be appointed; (5) that the defendants and each of them deliver to this plaintiff, or to some person to be designated by the court, all moneys or property belonging to the corporation which they have in their possession or under their control; (6) that the court award the plaintiff such other and further relief as may be just.

The corporation demurred to the complaint upon the ground that the facts stated therein did not constitute a cause of action; that there was a misjoinder of causes of action, and also a defect of parties defendant in that the plaintiff had not made the directors of the corporation parties. The demurrer was sustained upon the grounds first named, and judgment entered upon the decision to this effect dismissing the complaint upon the merits, from which the plaintiff appeals.

I am of the opinion that the demurrer was properly sustained, not only upon the grounds named, but also could have been sustained upon the third ground. There is no allegation anywhere to be found in the complaint that the defendants are or were, at the time complaint is made of the action of the corporation, its directors. The statute makes the directors of a corporation the managers of its business and affairs, and it is of no importance what a stockholder does unless he be a director, because the statute does not commit to him any voice in the management of the business of the corporation, nor is he in any way made responsible for it. Nor is there

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any allegation to the effect that a demand has been made upon the corporation to bring an action to recover of the defendants the damages alleged to have been sustained by reason of the wrongful acts complained of, nor are any facts stated which enable the plaintiff to maintain the action in the absence of such demand. (*O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46.)

Causes of action have been improperly united, one being by a shareholder to compel an accounting by the directors of the corporation of their official acts and a restitution to the corporation of property wrongfully received by them; and the other by a shareholder to recover damages which he personally has sustained by reason of the wrongful acts of the defendants, two separate and distinct causes of action, which cannot be united in the same complaint. (*Groh v. Flammer*, 100 App. Div. 305.)

While I am of opinion that the demurrer was properly sustained, I am also of the opinion that the court erred in dismissing the complaint upon the merits, and for that reason the judgment appealed from, to this extent, is erroneous. The court should not have dismissed the complaint upon the merits. The merits of the allegation set out in the complaint could only be determined after a trial, not of law but of the facts involved, unless such facts could not by any possibility be changed by an amendment of the pleading or there would be no legal liability on the facts. The most cursory examination of this complaint shows that it is possible to allege a different state of facts, for which reason it was improper to dismiss the complaint upon the merits, and for the same reason the plaintiff should have been afforded an opportunity to amend.

The judgment appealed from, therefore, should be modified by striking out the words which appear therein "on the merits," without costs to either party, and inserting a provision permitting the plaintiff to serve an amended complaint within twenty days after the entry of the order of modification and service of notice thereof on defendant's attorney, and on payment of the costs in the court below.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgment modified as directed in opinion, without costs to either party. Settle order on notice.

EUGENE L. BUSHE and STEPHEN FISKE, Individually and as Trustees for GUNNING S. BEDFORD, JR. (Also Called "GUNNING S. BEDFORD" and "GUNNING S. BEDFORD, 3D"), Under a Certain Deed of Trust, Dated June 8, 1892, and Executed by MARY E. WRIGHT to GUNNING S. BEDFORD (Also Called "GUNNING S. BEDFORD, 2D") and EUGENE L. BUSHE, as Trustee for Said GUNNING S. BEDFORD, JR., Respondents, v. MARY E. WRIGHT and Others, Respondents, Impleaded with HELEN MARTHA BEDFORD, Individually and as Executrix, etc., of GUNNING S. BEDFORD, 3D, Deceased, Appellant.

First Department, March 22, 1907.

**Trust deed executed by spendthrift for his own benefit — when same not procured by fraud or undue influence — party — when widow of beneficiary may contest the validity of deed.**

A deed or conveyance by which one occupying a position of confidence and trust acquires an interest in the property conveyed is not absolutely void, but voidable at the election of the beneficiary or the *cestui que trust* and is valid until avoided. So, too, such deed may be ratified by the beneficiary or *cestui que trust*, and when once ratified no action can be maintained by the grantor or his personal representative to avoid it.

Hence, when an uncle of a minor who has been living a life of dissipation and is heavily in debt induces him on reaching majority to convey property coming from the estate of his mother to a third person, who reconveys it to the uncle and another as trustees to pay the income to the spendthrift and his wife for life and at his death the principal to his descendants, if any, and if not, to his lawful heirs on his father's side, and the beneficiary acquiesces in the deed and receives the income until the time of his death, eleven years thereafter, his widow is not entitled to set aside the deed of trust as procured by fraud and undue influence.

However, the widow being also a beneficiary under the deed of trust, is entitled to contest its validity in an action brought by the trustee to construe it, but she cannot demand an accounting by the trustee as executor of her husband's father when all the interested parties are not before the court.

APPEAL by the defendant, Helen Martha Bedford, individually and as executrix, etc., from a judgment of the Supreme Court in favor of the plaintiffs and certain of the defendants, entered in the office of the clerk of the county of New York on the 22d day of March, 1906, upon the report of a referee.



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*Henry W. Bookstaver*, for the appellant.*Franklin W. M. Cutcheon*, for the plaintiffs, respondents.*Frederic R. Coudert*, for the respondents Zerega and others.*Tompkins McIlvaine*, for the respondent Wright.

INGRAHAM, J.:

This action was brought for the judicial settlement of the accounts of the plaintiff as surviving trustee of a trust contained in a deed executed on the 8th of June, 1892, whereby the defendant Mary E. Wright conveyed certain property to Gunning S. Bedford, 2d, and Eugene L. Bushe as trustee for Gunning S. Bedford, 3d. The complaint asks the court to construe the deed of trust and to determine its effect with reference to any and all questions that may arise upon the accounting had in this action concerning the validity, construction or effect of the said deed; and also to determine the various interests of the parties to this action in the trust estate and funds, and to determine the ultimate disposition of the trust property. By this deed certain real property situated in the county of New York was conveyed to Gunning S. Bedford, described as 2d, and Eugene L. Bushe as trustee for Gunning S. Bedford, Jr., hereinafter described as Gunning S. Bedford, 3d. The property conveyed was in trust "to receive the rents, issues and profits thereof, and after the payment of all charges and expenses to apply the net income thereof to the use, maintenance and support of the said Gunning S. Bedford, Jr., in a style and manner befitting his station in life," with power to the trustees during the lifetime of the said Gunning S. Bedford, 3d, "to apply such portion of such net rents, income and profits, as they may deem proper, to the use, maintenance and support of the wife of said Gunning S. Bedford, Jr., in case he shall marry, and to the use, maintenance, support and education of any lawful issue of said Gunning S. Bedford, Jr.;" that "upon the death of said Gunning S. Bedford, Jr., said trustees shall convey, pay and make over the whole of said trust estate then in their hands to the then living lawful issue of said Gunning S. Bedford, Jr., and to the descendants of any such lawful issue of his who shall have died leaving descendants him or her surviving; \* \* \* and in

case there shall then be no surviving lawful issue of said Gunning S. Bedford, Jr., nor any living descendants of such issue, then to convey, pay and make over all of said trust estate then in their hands to the lawful heirs at law of the said Gunning S. Bedford, Jr., on his father's side." The trustees were also given power to apply the whole or any part of the capital of the trust estate to the use and benefit of Gunning S. Bedford, 3d. This instrument was dated June 8, 1892; was acknowledged on the 9th of May, 1893, and was recorded in the office of the register of the county of New York on the 22d day of November, 1898. It was stipulated by all the parties to the action that the plaintiff had paid over to Gunning S. Bedford, 3d, or expended for him during his lifetime all of the net income of the trust estate.

The complaint alleges, and it is admitted, that Gunning S. Bedford, 3d, died in the city of Paris on or about the 17th day of February, 1903, without lawful issue him surviving; leaving the defendant Helen M. Bedford as his widow, and leaving a last will and testament by which he gave, devised and bequeathed all his property, real and personal, to his widow, the defendant Helen M. Bedford, and appointed her sole executrix, which last will and testament was duly admitted to probate by the surrogate of the county of New York, and letters testamentary duly issued to her. She appeared individually and as executrix of Gunning S. Bedford, 3d. Her answer, after admitting the execution of the deed under which the plaintiffs claimed to act as trustees, alleges that Gunning S. Bedford, 3d, was the only child of M. Amelia and Dr. Frederick Bedford; that M. Amelia Bedford died on or about the 14th day of July, 1871, leaving a last will and testament which was admitted to probate by the surrogate of the county of New York on the 31st day of July, 1871, and in which will she appointed her husband, Frederick Bedford, as executor and trustee of her estate; that by that will the property of the testatrix, M. Amelia Bedford, was devised and bequeathed, one-half thereof to her husband, Frederick Bedford, absolutely, and the other half to her husband in trust for her child Gunning S. Bedford, 3d, to apply the rents, income and profits to the support and education of the child during minority, and to assign the principal of said share, with all accumulations, to such child on his attaining lawful age; that the said

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Frederick Bedford received as a portion of the estate of his wife certain real property that had belonged to his wife at the time of her death, the title to which was taken in his own name individually, or as executor of his wife, M. Amelia Bedford; that such real property was held and controlled by the said Frederick Bedford until his death on the 28th day of December, 1891. He left a last will and testament appointing Gunning S. Bedford, 2d, the uncle of Gunning S. Bedford, 3d, and the plaintiff Eugene L. Bushe as executors and trustees under his will. By this will Frederick Bedford left three-fourths of his residuary estate to the plaintiff Eugene L. Bushe and Gunning S. Bedford, 2d, in trust for Gunning S. Bedford, 3d, during life with remainder to his issue and remainder over in case he should die without issue; that on the death of Frederick Bedford, Gunning S. Bedford, 2d, and the plaintiff Eugene L. Bushe took possession of all the property of Frederick Bedford and held the same under the trust contained in such will. Gunning S. Bedford, 2d, died on the 29th day of October, 1893, leaving a last will and testament of which the plaintiffs Bushe and Fiske were executors, which will was duly admitted to probate and letters testamentary were issued thereon; that upon Gunning S. Bedford, 3d, arriving at the age of twenty-one on the 7th day of June, 1892, he was thus entitled to an undivided half interest in the property left by his mother, with any income thereof which had not been applied to his support and education. He was also entitled to receive the income during his life of the property of his father, Frederick Bedford, which was held in trust by the plaintiff Eugene L. Bushe, as surviving trustee, and was also entitled to an interest in the property of Gunning S. Bedford, 2d, which was held in trust by the plaintiffs Eugene L. Bushe and Fiske, as trustees. It would appear that these various properties had been held together and controlled by the plaintiffs Eugene L. Bushe and Gunning S. Bedford, 2d, until the death of Gunning S. Bedford, 2d, and subsequently by the plaintiff Eugene L. Bushe down to the death of Gunning S. Bedford, 3d. It was alleged that the said Gunning S. Bedford, 3d, had no experience in business, and no aptitude to the same, and his rights in the estate of his mother, M. Amelia Bedford, were never discovered by him, nor was he ever informed of them by the plaintiffs Eugene L. Bushe and Gunning S. Bedford, 2d; that after the death of Fred-

erick Bedford, Gunning S. Bedford, 2d, had acted as trustee, guardian, agent and attorney for the said Gunning S. Bedford, 3d, who implicitly trusted him and was guided by his wishes and desires. The answer then sets up various counterclaims. The only one necessary to be considered in this case is based upon the following facts: When Gunning S. Bedford, 3d, arrived at age on the 7th day of June, 1892, he was entitled to an interest in certain real property which had been held by his father in trust. On that day he executed a deed conveying this real property to the defendant Mary E. Wright. There was no consideration for this deed and it was executed under the advice of the plaintiff Bushe and Gunning S. Bedford, 2d, with the understanding that it was for the purpose of putting this property in trust for his benefit. Subsequently the defendant Mary E. Wright conveyed this same property to Gunning S. Bedford, 2d, and Eugene L. Bushe as trustee for Gunning S. Bedford, 3d, and it is this deed which is described in the complaint. The counterclaim alleges that if the said deed was executed by Gunning S. Bedford, 3d, the same was void as having been obtained by fraud and undue influence and without consideration and especially by the undue influence of said Eugene L. Bushe and said Gunning S. Bedford, 2d, and Mary E. Wright, and the defendant Helen Martha Bedford asks that the deed from Gunning S. Bedford, 3d, to Mary E. Wright and the deed of Mary E. Wright to the plaintiff Bushe and Gunning S. Bedford, 2d, as trustees, be set aside and declared void; that the widow of Gunning S. Bedford, 3d, recover of all the assets of the estate of the mother of Gunning S. Bedford, 3d, to which he was entitled; that the defendant Helen M. Bedford, as legatee and devisee of Gunning S. Bedford, 3d, be declared to be the owner of all the property to which Gunning S. Bedford, 3d, was entitled; that the plaintiffs be required to account for all the estate of M. Amelia Bedford in which said Gunning S. Bedford, 3d, had an interest, and that all the property of Frederick Bedford be sold to realize the amount of the interest of Gunning S. Bedford, 3d, in the estate of M. Amelia Bedford, and that the plaintiff Bushe, as sole surviving executor of Frederick Bedford, account for and render an account of all the doings and acts of said Frederick Bedford as executor of the estate of M. Amelia Bedford.

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The only question that is at issue in this action relates to the validity of the deed from Gunning S. Bedford, 3d, to Mary E. Wright, and the deed from Mary E. Wright to the plaintiff Bushe and Gunning S. Bedford, 2d, in trust. The questions in relation to the accounting of Bushe as executor of Frederick Bedford cannot be settled in this case for it does not appear that all the parties interested in the estate of M. Amelia Bedford are before the court. This action having been based entirely upon the trust deed by which the plaintiff Bushe became trustee for the benefit of Gunning S. Bedford, 3d, it was competent for the legatees and devisees of Gunning S. Bedford, 3d, to contest the validity of the deeds, but the other relief which the defendants ask in the answer by way of counterclaim has no relation to the validity of this deed or the action of the plaintiffs as trustees under it. Gunning S. Bedford, 3d, was born on the 7th day of June, 1871. His mother, M. Amelia Bedford, died on July 14, 1871; letters testamentary were issued to Frederick Bedford on her estate on July 31, 1871. At the time of her death she was entitled to seven-sixteenths of the property of a former husband named Lucius Chittenden, and after the death of M. Amelia Bedford the executor of the estate of Lucius Chittenden sold at public auction all of the real property of the said Chittenden, and at such sale Frederick Bedford purchased portions of the property and paid therefor by giving a receipt to the executor for the interest of his deceased wife in said estate; that he took conveyances of approximately one-half of the lands so purchased to himself individually on account of the one-half share of his wife's estate devised and bequeathed to him, and the other one-half to himself as executor of his wife, on account of the one-half share of his wife's estate devised and bequeathed to him in trust for their son, Gunning S. Bedford, 3d. These conveyances were all recorded prior to the year 1873, and the property remained in this condition until his death on December 28, 1891, and it was the property that he held as executor that vested in Gunning S. Bedford, 3d, that he conveyed to Mary E. Wright, the conveyance of which is sought to be set aside in this action.

It appeared that Gunning S. Bedford, 3d, was over twenty years of age at the death of his father. Apparently he had lived with his father from the death of his mother. It is stated that after his

father died he continued to reside with his uncle, Gunning S. Bedford, 2d; that before his arrival at the age of twenty-one years he had been living a wild life, was addicted to gambling, and had some difficulty with a woman; that he had bought jewelry and other articles on credit and pawned them without paying for them. After the death of Frederick Bedford, and before Gunning S. Bedford, 3d, became of age, Gunning S. Bedford, 2d, and Mr. Bushe had several consultations in relation to this property. As the result of their consultations, deeds from Gunning S. Bedford, 3d, to Mary E. Wright, and from Mary E. Wright to Gunning S. Bedford, 2d, and the plaintiff Bushe, as trustees, were prepared. On the day that Gunning S. Bedford, 3d, became of age he came to Mr. Bushe's office with Gunning S. Bedford, 2d, and Mary E. Wright. It was then stated to him by Gunning S. Bedford, 2d, and Mr. Bushe that they desired him to execute this deed to protect his property and to preserve it for his benefit; that it was exposed to risks incident to the debts that he was incurring and might incur; that it was then said that Mary E. Wright was to execute a deed which would secure to Gunning S. Bedford, 3d, the property conveyed to her by him, and that to carry that arrangement into effect the deed to Mary E. Wright was executed by Gunning S. Bedford, 3d, and the trust deed described in the complaint was executed. Bushe testified that he had no previous conversation with Gunning S. Bedford, 3d, prior to the date that he executed the deed; that at that date he knew of the will of M. Amelia Bedford and had examined it; that it had been arranged before that Gunning S. Bedford, 3d, should go to Europe; that it was stated to Gunning S. Bedford, 3d, at the time the deed was executed that it was necessary to make some disposition or arrangement in regard to this real estate to protect it from the onslaught of creditors; that Gunning S. Bedford, 2d, and Bushe had ascertained a good many liabilities of Gunning S. Bedford, 3d; that he had been giving promissory notes and drafts, and they had heard of many things which caused them anxiety about the future of this property, which had descended to him from his mother. After the execution of this deed to Mary E. Wright, Gunning S. Bedford, 3d, left New York for Europe, and, with the exception of one or two short visits to this country, he remained there until his death in 1903. During this time the plaintiff Bushe acted

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as trustee for this property, receiving the income from these three trust estates and making remittances to Gunning S. Bedford, 3d, from time to time. Upon one of the trips to this country he married the defendant Helen M. Bedford and returned with her to Paris, and his correspondence with Mr. Bushe during the time that he was in Paris shows that he was in constant difficulties about money matters, he and his wife constantly requesting that additional moneys be sent to them. Thus for over eleven years from the time he executed this deed he continued to receive the income to which he was entitled. At no time during his life did he in any way object to the execution of this instrument or elect to rescind it. There is no evidence that his uncle, with whom he lived after the death of his father and upon whose advice he executed this deed, did not fully explain to him the situation in relation to it. There is no evidence that any duress or influence was exercised to persuade him to execute it. So far as appears it was a voluntary conveyance, made with full knowledge of the situation and of his rights under it. This whole property was to be held for his benefit during his life, and the remainder was to become the absolute property of his children. So far as appears there was not the slightest attempt to take any advantage of him, except to prevent the property that he had inherited from being squandered; and the picture that we have of this young man before the execution of the deed and his subsequent life in Paris, as disclosed by his own letters and the letters of his wife, certainly justified the judgment of his uncle and Mr. Bushe in considering that his interest and the interest of his children, if any, would be subserved by the arrangement that was made. The position is taken by the defendant — and is the only one that needs any consideration — that in consequence of the relation that existed between Gunning S. Bedford, 3d, and Gunning S. Bedford, 2d, and the plaintiff Bushe, any instrument that he executed on their advice or procurement, in which they or either of them would benefit, to be sustained must be affirmatively shown to have been executed with full knowledge of the situation and his rights in relation to the property, and that the instruments executed were advantageous and proper under the circumstances, and that the proof fails to show that any such disclosures were made to him. It is claimed, because in the event of Gunning S. Bed-

ford, 3d, dying without issue before the death of Gunning S. Bedford, 2d, that Gunning S. Bedford, 2d, would secure an advantage to himself, and that, therefore, these instruments must be adjudged void; but the grantor, Gunning S. Bedford, 3d, never elected to avoid these deeds, or in any way indicated his dissatisfaction with the arrangement that had been made by him and for his benefit. I can find no evidence that he was not fully apprised of his interest in his mother's estate and that it was this interest that he had conveyed. He certainly must have understood that he was conveying property in which he had an interest. He received during his life whatever income was received by the trustees from the trust property which he had conveyed. He was in constant need of money, but during all the time he made no demand for a rescission of this conveyance or demanded that any of the property that he had conveyed should be reconveyed to him. He made no claim that he had been deceived, that any advantage had been taken of him, or that he wished the arrangement which assured the property to him for his life, and the remainder afterwards to his children, to be in anywise altered. If we may assume that he would have had the right to avoid these instruments at any time during his life upon proof of any fact which would justify an inference that he executed them without knowledge of their contents, or without realizing what he had done, or without full knowledge of his rights to the property under his mother's will, his silence during these years, and the receipt of the income of the trust property from the trustees, certainly must be considered as an election to affirm the arrangement that was made which was certainly for his benefit, and even now there is not the slightest evidence that he ever wished to change that arrangement or ever elected to avoid the conveyance. The two persons who had to do with this arrangement (the grantor and his uncle, Gunning S. Bedford, 2d) are both dead. What passed between them we do not know, but there is certainly no presumption that the uncle who had lived with the boy from his infancy, who left him a life interest in a large portion of his property, and who apparently had the greatest interest in his welfare, procured by any improper influence or otherwise the execution of this conveyance. Certainly after eleven years had passed, during which time the one interested had by his action ratified the arrange-



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ment that had been made for him, and died without ever expressing any dissatisfaction with it, or without making any election to avoid it, his executrix cannot elect to have the whole instrument declared void.

It is an elementary principle that a deed or conveyance by which a trustee, or one occupying a position of confidence and trust, acquires an interest in the property conveyed is not absolutely void, but voidable at the election of the beneficiary or *cestui que trust*; that until such beneficiary or *cestui que trust* elects to avoid it, the deed is valid; and from this it follows that such a deed may be ratified, and when once ratified, an action cannot be maintained by the grantor or his personal representatives who avoided it. (*Dodge v. Stevens*, 94 N. Y. 209.) In that case it is said: "But a purchase by a trustee, for himself, of trust property, in respect of which he has a duty to perform inconsistent with the character of purchaser, is voidable at the election of the *cestui que trust*, and not absolutely void. The *cestui que trust* may affirm the transaction and treat the trustee as purchaser, or he may disaffirm the purchase; and in case of real estate, if the title has become vested in the trustee by a conveyance, may compel the trustee to convey to him, or in trust for him, as the case may require." In *Harrington v. Erie County Savings Bank* (101 N. Y. 257) the same principle was applied, the court saying: "The appellant relies upon the well-established doctrine that a trustee cannot purchase or deal in the trust property in his own behalf, or for his own benefit, directly or indirectly. This is a rule of equity and is not to be impaired or weakened. Such a purchase, however, is not void *ab origine*, but voidable only, and at the instance of the *cestui que trust*, or of a party who has acquired the rights which belong to one in that relation. Even while in the hands of the trustee the title may be confirmed as well by acquiescence and lapse of time as by the express act of the *cestui que trust*;" and *Kahn v. Chapin* (152 N. Y. 305) was determined by the application of the same principle, and the same principle has been applied in the case of a conveyance by a person of unsound mind.

I think the conduct of the grantor during the eleven years of his life after the execution of this deed, his receipt of the income of the trust property conveyed by the deed and his dying without electing to avoid it was a ratification which estopped his personal

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representatives from maintaining an action to avoid it; and certainly this would be so in the absence of any evidence tending to show that the grantor was not fully informed of the situation, and of his rights and interest in the property, and the circumstances which rendered the arrangement that was made beneficial.

My conclusion, therefore, is that the judgment appealed from should be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment affirmed, with costs. Settle order on notice.

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In the Matter of the Probate of the Last Will and Testament of  
JOHN A. DISNEY, Deceased.

MARY J. MCKENNA, a Next of Kin, Appellant; FANNIE K. COHN,  
a Legatee, Respondent.

First Department, March 22, 1907.

**Will construed — when issue of deceased legatee take by implication.**

When a testator leaves the residuary estate to his stepmother and his sister in equal portions and provides that "in the event of either dying without issue surviving, I give, devise and bequeath the share or portion of the one so dying to the survivor," the issue of the stepmother take her share by implication although she died before the testator.

INGRAHAM, J., dissented, with opinion.

APPEAL by Mary J. McKenna, as next of kin of John A. Disney, deceased, from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 29th day of June, 1906, in so far as such decree construes the will of John A. Disney, deceased.

*Edward L. Stevens*, for the appellant.

*John F. Nelson*, for the respondent.

Houghton, J.:

On proceedings for the probate of the last will and testament of John A. Disney, deceased, the appellant, a daughter of a deceased

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sister of the testator, not provided for by the will, filed contesting allegations, and asked that in case of admission to probate the surrogate construe the residuary clause thereof. That clause provided as follows:

*"Seventh.* All the rest, residue and remainder of my estate, of every kind and nature whatsoever, I do give, devise and bequeath to my mother Mary E. Disney, and my sister Fannie K. Cohn in equal shares or portions, to have and to hold the same absolutely and forever; and in the event of either dying without issue surviving, I give, devise and bequeath the share or portion of the one so dying to the survivor."

Although mentioned as mother, Mary E. Disney was the step-mother of the testator, she having married his father and had two children by him, Fannie K. Cohn and Charles S. Disney, who were hence brother and sister of the half blood of testator. The son Charles had died leaving a daughter, Florence, an infant, who is still alive.

Mary E. Disney died before the testator, and it is conceded that certain bequests to her in prior portions of the will lapsed and fell into the residuary clause above quoted.

The surrogate held that Fannie K. Cohn, the survivor of the residuary legatees, took the whole of the residuum, and so decreed.

The appellant contends on her appeal therefrom that the testator died intestate as to one-half of the residuum, because Mary E. Disney did not die "without issue surviving," and thus fulfill the condition of the gift over to the survivor, for she, in fact, left her surviving Fannie K. Cohn, her daughter, and Florence Disney, her granddaughter.

The respondent insists that the word "issue" should be held to mean children only, and that the testator, understanding fully the situation of affairs, intended the term "dying without issue surviving" to apply to Fannie only; and that in the event of her death prior to his own without issue, and the survival of the mother, all was to go to her, and that if the mother should predecease him all was to go to Fannie.

Little is to be gathered from the context of the will which throws light upon the meaning of the testator, aside from the fact that the dominant idea was to provide for his mother and his half-sister,

Fannie K. Cohn. Both were made executors, and no bequests were made to any other of his relatives aside from \$1,000 each to his two living sisters and the same sum to the child of Fannie.

The primary meaning of "issue" or "lawful issue" is descendants, and in the absence of the use of the words in a will in another sense they will be so construed. (*New York Life Ins. & Trust Co. v. Viele*, 161 N. Y. 11; *Chwatal v. Schreiner*, 148 id. 683.)

In our view of the case so far as the question presented upon this appeal is concerned, it is unimportant to determine whether the testator used the word "issue" in its broad or restricted sense, or to enter into refinements as to whether the word is used respecting Fannie alone or applies to both the residuary legatees; for we are of the opinion that in no event has the appellant any interest in the estate of the testator.

Even if Fannie K. Cohn did not take the whole of the residue as the survivor of the two residuary legatees, we think there was a gift by implication to the issue of Mary E. Disney, and hence that the one-half of the residue which she would have taken had she lived, passed under the will to Fannie, her daughter, and to Florence, her granddaughter.

The testator having executed his will is presumed to have intended to dispose of all his property, and if possible from fair intent, the courts will so construe its provisions as to prevent intestacy of any part. Especially is this rule true of a residuary clause. (*Lamb v. Lamb*, 131 N. Y. 227.)

The position of the appellant is that the surviving residuary legatee cannot take because Mary E. Disney did not meet the condition of the will and die without issue, and hence that because she died with issue there was no disposition of the one-half of the residue.

The words "dying without issue surviving" must be presumed to have been used for some purpose. Fannie had a child to whom the testator had bequeathed \$1,000. If both the mother and Fannie had predeceased the testator, unless these words be given some effect, although both may have left issue, the testator must in such case have been held to have died intestate as to the residue of his estate. Having used the words "dying without issue surviving" can it be said that he intended to die intestate if both died before

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himself and each left issue surviving her? No such intent can be imputed except from necessity. The more reasonable hypothesis is that in case either died leaving issue, such issue should take in place of the one so dying.

Bequests and devises by implication are not infrequent. Where land is devised to the heir after the death of A, although no specific life estate is conferred upon A, he takes one by implication.

In *King v. Barker* (3 Bradf. 126) the testator devised and bequeathed the residue of his estate to children of his deceased brothers as tenants in common, and provided as follows: "And should either of the said seven children die before me, without leaving any child or other descendant, I hereby give, devise and bequeath the residuary share or portion of the one so dying to her or his surviving brothers or sisters." One of the residuary legatees having died before the testator leaving children, it was held by the surrogate although there was no express gift, that there was an implied gift to such children.

The opinion in the above case is a logical and learned one, and refers to the authorities sustaining the holding at hand at the time it was written. The question does not appear to have been considered by any other of the courts of this State. In England, however, the question has been considered in several cases.

By the will considered in *Ex parte Rogers* (2 Madd. 449) a sum was given to a niece "and at her decease without child or children" over to another. The legatee died leaving children, and it was held that there was a gift by implication to her children and that the money did not pass to the contingent legatee.

Bequests by implication founded on the same principle were held to have been effectual in *Abbott v. Middleton* (21 Beav. 143) and in *Crowder v. Clowes* (2 Ves. Jr. 449) and in *Wainwright v. Wainwright* (3 id. 558) and in *Dowling v. Dowling* (L. R. 1 Eq. Cas. 442). The rule was applied in *Holton v. White* (23 N. J. Law [3 Zab.], 330).

Whether the entire residue passed to Fannie or whether the one-half was divided between her and the granddaughter, Florence, is not before us to specifically decide. In our opinion the testator did not die intestate as to any part of his residuary estate, and so far as this appellant is concerned she has no interest in the estate whether

it passed one way or the other. Not having any interest, whether the decree of the surrogate was right or wrong as between Fannie K. Cohn and Florence Disney is of no importance to the appellant, and the decree must be affirmed, with costs.

PATTERSON, P. J., McLAUGHLIN and CLARKE, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

The testator died on the 7th day of January, 1906, unmarried and without issue, leaving his brothers and sisters and descendants of a deceased brother and sister his heirs at law and next of kin. He left a last will and testament, which was presented for probate. Upon the probate proceeding the parties interested requested the surrogate to construe the will. After a bequest and devise to Mary E. Disney, he disposed of the residuary estate by the 7th clause of the will as follows: "*Seventh.* All the rest, residue and remainder of my estate, of every kind and nature whatsoever, I do give, devise and bequeath to my mother Mary E. Disney, and my sister Fannie K. Cohn, in equal shares or portions, to have and to hold the same absolutely and forever; and in the event of either dying without issue surviving, I give, devise and bequeath the share or portion of the one so dying to the survivor."

Mary E. Disney was the testator's stepmother. She died before the testator, and the question presented is as to what disposition, if any, was made of the undivided half of the residuary estate devised and bequeathed to her. The surrogate construed the will as giving to Fannie K. Cohn the whole of the residuary estate. The appellant claims that as the legacy to Mary E. Disney lapsed in consequence of her death before the testator, he died intestate as to the half of the estate so devised and bequeathed to her. The property was given to Mary E. Disney and Fannie K. Cohn equally as tenants in common. (*Matter of Seebeck*, 140 N. Y. 241; *Matter of Kimberly*, 150 id. 90.) If Mary E. Disney had survived the testator, she would have been entitled to an undivided share of this property as tenant in common. The testator then provided that in the event of her death, "without issue surviving," her share or portion should go to the survivor. She did not die without issue surviving, but had living issue, a daughter and grandchildren. The

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testator could not have understood that by this provision of the will, if she had left issue surviving that her share should go to the survivor. He probably thought that in the event of her dying leaving issue surviving the share would go to the issue, but this is mere speculation. The will, however, is clear and unambiguous. He gave one-half of his residuary estate to his stepmother, and then provided that in the event of her dying without issue surviving, the whole of the residuary clause should go to his sister Fannie. The mother did not die without issue surviving and, therefore, the contingency upon which Fannie should take the whole of the residuary estate did not happen. Certainly the will does not directly give to Fannie the whole of the residuary estate in the event of his mother dying leaving issue surviving; and it seems to me that there is no indication for an intention that the testator's sister Fannie should have the whole residuary estate, except upon one condition mentioned, namely, the death of his mother without issue surviving. We do not know what the testator had in mind in making this will and we are restricted, therefore, to the express language used.

It is settled that if the residuary of the estate is given to several in common and one of them dies, the legacy lapses and the testator died intestate as to such share. (*Floyd v. Barker*, 1 Paige, 480; *Hard v. Ashley*, 117 N. Y. 606.) In the latter case Judge GRAY says: "The fact that one of the legatees, Lucretia Rice, predeceased the testator does not affect the question of distribution, otherwise than that, as the result of her death was to cause her legacy to lapse and to fall into the residue, her share in the residuary estate is undisposed of and passes to the next of kin. The lapse, by death, of the legacy does not disturb the proportions, and, of course, it does not become distributable among the other legatees. As to that portion of the residuary estate the testator died intestate." It is a settled rule that where the language of a residuary clause is capable of more than one construction the court will favor the construction that will prevent intestacy; but the application of this rule does not allow the court to make a new will for the testator which will dispose of the property in a way not justified by any reasonable construction of the will. The testator certainly must have meant something by inserting the words "without issue surviving," and he

could only have meant that the condition upon which the survivor of the two legatees should take was the dying of the other legatee without issue surviving. If we assume that the testator considered that upon the death of his stepmother leaving issue, the share devised to her would go to the issue, we cannot give effect to that understanding because the law steps in and says that a legacy to a person dying before the testator lapses, except the case of a descendant of the testator leaving issue. Whatever understanding the testator had as to the effect of the death of his mother before his own cannot overcome a settled rule of law as to the lapsing of a devise or legacy.

I think that the lapsed bequest and devise to his mother in the 2d and 3d clauses of the will became a part of the residuary estate, and that Fannie K. Cohn was entitled to one-half of the whole estate, including these lapsed legacies contained in the 2d and 3d clauses of the will, and that, as to the other half of the residuary estate, the testator died intestate, and it passed to his heirs at law and next of kin.

The decree appealed from should be modified accordingly, with costs to all parties who have appeared on this appeal, payable out of the estate.

Decree affirmed, with costs. Order filed.

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FRANK A. SELAH, Appellant, v. THE NEW YORK TIMES COMPANY,  
Respondent.

First Department, March 22, 1907.

**Case — when appellant entitled to have evidence excluded on objection of respondent appear in case.**

When in an action to recover for services rendered, the defendant introduces a receipt signed by the plaintiff and the plaintiff's explanation as to why he signed the paper is excluded on the objection of the defendant, the plaintiff is entitled to have the excluded question contained in the printed case in order that the defendant cannot reverse the judgment on the ground that there was a failure of evidence when the same was excluded on his own objection. This is so, although the plaintiff's exceptions to the exclusion of the evidence were not well taken.



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APPEAL by the plaintiff, Frank A. Selah, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of January, 1907, denying the plaintiff's motion for an order resettling the case upon appeal herein.

*W. M. Seabury*, for the appellant.

*Alfred A. Cook*, for the respondent.

INGRAHAM, J.:

Upon the trial of this action, which was to recover for services rendered by the plaintiff to the defendant, a receipt signed by the plaintiff had been introduced in evidence. When plaintiff was on the stand he was handed this receipt and asked what explanation he had to make as to his signature to the paper. That was objected to by the defendant and the objection sustained. Other questions were asked in relation to this receipt, and to show that at the time the receipt was given it was not intended to release the defendant from all claims by the plaintiff. This evidence was excluded upon the objection of the defendant.

The plaintiff recovered a verdict from which the defendant has appealed. In making up the case on appeal the defendant excluded the questions relating to the release excluded at the trial, and the plaintiff respondent sought to have the questions inserted with a statement that they were excluded on objection by the defendant. The learned trial judge refused to allow these amendments.

It would appear that upon the appeal the question would be raised as to the effect of this receipt, and it may become material for the plaintiff to show that he had offered to explain it but that his testimony in relation to it was excluded on objection of the defendant, so that he could have the benefit of the rule that an appellant cannot have a judgment reversed on the ground that there was a failure of evidence where on his own objection the evidence upon the subject had been excluded. I think the plaintiff was entitled to have this fact appear in the case. There is no dispute about the facts. The questions were asked by the plaintiff; were objected to by the defendant, and on such objection the

evidence was excluded. The plaintiff's exceptions to the rulings would be entirely immaterial and were quite properly excluded from the case, but the fact that this testimony was offered and excluded in consequence of the objections of the defendant should appear.

The order appealed from should, therefore, be reversed, with ten dollars costs and disbursements, and the case sent back to the learned trial justice to resettle the case in accordance with the views here expressed.

PATTERSON, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and case remitted as stated in opinion. Order filed.

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In the Matter of the Application of SAMUEL H. ORDWAY and WILLIAM E. WYATT, Appellants, for a Writ of Mandamus Pursuant to Section 114 of the Election Law.

BOARD OF COUNTY CANVASSERS OF THE COUNTY OF NEW YORK,  
Respondent.

First Department, March 22, 1907.

**Election Law—mandamus directing recount of votes—petition must state particular districts in which ballots were improperly counted.**

In a petition for mandamus under section 114 of the Election Law to obtain a recount of ballots which were counted although marked for identification and other ballots which were rejected as void, the petitioner must state the particular election districts in which the facts stated appeared upon the certified return. A general allegation that in the certified original returns of the canvass of the vote in all the election districts of the city, such ballots appeared is not such compliance with the statute as justifies the issuance of a mandamus to include all the election districts of the city.

APPEAL by the petitioners, Samuel H. Ordway and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New

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York on the 30th day of November, 1906, denying the petitioners' motion for a writ of mandamus under section 114 of the Election Law.

*D-Cady Herrick*, for the appellants.

*Terence Farley*, for the respondent.

INGRAHAM, J.:

One of the relators was a candidate for justice of the Supreme Court and the other a candidate for judge of the Court of General Sessions of the county of New York at the general election held on the 6th of November, 1906. The relators on the 26th of November, 1906, presented a petition to the Supreme Court which alleged that "the certified original statements of the results of the canvass in the various Election Districts of the various Assembly Districts of the County of New York show that certain of the ballots counted at said election held November 6, 1906, were objected to as marked for identification, and that other ballots were rejected by inspectors of election in said various Election Districts as void and which were not counted for any candidate." And the relators asked for a writ of mandamus pursuant to the provisions of section 114 of the Election Law directed to the board of county canvassers for the county of New York directing said board either to count or not to count the said ballots as this court may determine and for other and further relief.

Section 114 of the Election Law (Laws of 1896, chap. 909) provides that "If any certified original statement of the result of the canvass in an election district shall show that any of the ballots counted at an election therein were objected to as marked for identification, a writ of mandamus may, upon the application of any candidate voted for at such election in such district, within twenty days thereafter, issue out of the Supreme Court to the board or body of canvassers, if any, of the return of the inspectors of such election district \* \* \*. If the court shall, in the proceedings upon such writ, determine that any such ballot was marked for the purpose of identification, the court shall order such ballot and the votes thereon to be excluded upon a recount of such votes. A like writ may in the same manner be issued to determine whether any

ballot and the votes thereon which has been rejected by the inspectors as void, shall be counted."

This section requires the person making the application to state the particular election districts in which the facts stated appear upon the certified original return, and it is only as to those election districts that a recount can be ordered. A general allegation that in the certified original returns of the canvass of the vote in all the election districts of the city such ballots appeared is not, I think, a sufficient compliance with the law to justify the court in one mandamus to include all of the election districts of the city of New York. The mandamus must specify the particular election districts in which a recount is to be commanded, and such a general allegation as is contained in this petition, which requires the court to issue a mandamus which would include all of the election districts of the city, is not, I think, a compliance with section 114 of the Election Law above cited. One proceeding undoubtedly could include several election districts, but the petition must show that in each of the election districts included there appeared, upon the certified original statement of the result of the canvass, the fact that ballots marked for the purpose of identification had been counted or that ballots had been rejected as void which should have been counted.

We think it clear that the discontinuance of the proceeding instituted upon the application of M. Linn Bruce and others, called the Judiciary Nominators, was not a bar to this application. In view of the statement of counsel for the relators that a question was presented as to the counting of the ballots which should be determined, we should be inclined to grant the mandamus if the petition complied with section 114 of the Election Law; but for the reason before stated we are forced to the conclusion that the facts required by this section did not appear to the court. The court, therefore, was justified in denying the application.

The order appealed from should, therefore, be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

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First Department, March, 1907.

CHARLES BURNHAM, Respondent, v. WILLIAM S. LAWSON and Others,  
Composing the Firm of WILLIAM S. LAWSON AND COMPANY,  
Appellants.

First Department, March 15, 1907.

**Principal and agent — conversion by stockbroker making unauthorized sale — when sale not ratified — measure of damages.**

A ratification of an unauthorized sale of stock by a broker, where no question of the rights of third persons is involved, implies a conscious and intended approval of the act done. It rests upon an actual and existing purpose to make such approval, and to meet this requirement it must be made with full knowledge of all the facts.

In an action against a broker to recover for the unauthorized sale of stock, it appeared that the plaintiff arranged to have his holdings cared for during his absence on a vacation and gave the defendant sufficient collateral to protect the account. The defendant sold out some of plaintiff's holdings and notified him by letter without stating the price for which the stock was sold.

*Held*, that as the plaintiff was not apprised of all the facts, a delay of twelve days in repudiating the transaction did not amount to a ratification thereof.

In an action to recover damages for such unauthorized sale it is error to charge that the plaintiff may recover the difference between the price at which the defendant sold the stock and the highest market price reached down to a reasonable time after the plaintiff received notice of the sale, with interest on the difference. The error consists in allowing the plaintiff to pick out the highest market price of the securities at any time between the date of sale and a reasonable time after receiving notice, while the proper rule is that he is only entitled to the highest price reached within a reasonable time after the plaintiff had learned of the conversion of the stock within which he could go into the market and repurchase it. When the facts are undisputed reasonable time is a question of law.

INGRAHAM and HOUGHTON, JJ., dissented in part, with opinion.

APPEAL by the defendants, William S. Lawson and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of March, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of April, 1906, denying the defendants' motion for a new trial made upon the minutes.

*James W. Gerard*, for the appellants.

*Herman Aaron*, for the respondents.

LAMBERT, J.:

The defendants are stockbrokers, and the plaintiff opened an account with them in or before the year 1902. In 1903 the plaintiff called upon the defendants and had an interview with Mr. Sullivan, a member of the firm, in reference to his stock transactions. There is a dispute as to what occurred, but the jury might properly find that the plaintiff arranged to have his transactions cared for during his absence on a vacation, and that he left with the defendants sufficient collateral to protect his account. The defendants sold out some of the plaintiff's holdings and this action is brought to recover damages.

The principal question raised by this appeal is whether the sale having been made, the plaintiff ratified the same. The leading transaction occurred on the 6th day of August, 1903. On that day there was a sharp decline in the market value of securities. The plaintiff owed the defendants on account \$40,485.60, and the market value of his securities on that day reached \$40,962. Under these circumstances the defendants sold 200 shares of Union Pacific stock at sixty-nine and one-half, and gave immediate notice of such sale to the plaintiff. He received the letter of notification on the following day at Prout's Neck, Maine. The letter did not, however, state the price for which the stock was sold. It indicated that there had been something of a flurry in the market; that there had been failures, and that the sale was made "to protect your account, as this stock moves very fast." It contained an expression of the opinion that the Union Pacific stock would go five to ten points lower, but nothing definite about the actual transaction, except that the stock in question had been sold. The plaintiff concededly did not act upon this letter. He remained silent at Prout's Neck for a week or ten days, and then went to New London where he remained a day and a half. While at this latter point the plaintiff received notice of the sale on the eighth day of August of the other securities which had been left in the hands of the defendants. The next morning he started for New York, arriving there on or about the seventeenth of August. He immediately complained to the defendants of his treatment, and this action was brought.

There is no serious question but that the plaintiff repudiated the

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transactions of the eighth of August, or that he is entitled to recover damages for the same. It is insisted, however, by the appellants that as to the 200 shares of Union Pacific stock, there was a ratification of the sale, evidenced by the fact that the plaintiff did not repudiate the same immediately upon being notified. We are of the opinion, however, that this contention is not sound. Whatever may be the rule in cases where the rights of third persons are involved, as between the immediate parties to the transaction, ratification implies a conscious and intended approval of the act done. It rests upon the actual and existing purpose to make such approval; and to meet this requirement it must be made with full knowledge of all the facts. (*Glenn v. Garth*, 133 N. Y. 18, 35.) In this case the plaintiff did not know the price which had been realized on the sale. It was known by the defendants that he was in the State of Maine on a vacation, where he was not likely to be in communication with the stock market. If his version of the affair is accepted, as it has been by the jury, the plaintiff had arranged with his brokers for the protection of his holdings, and he had a right to assume that the transaction was within the spirit of his agreement with the defendants and for his benefit. It was not until the seventeenth or eighteenth day of August that the plaintiff actually knew all of the facts in reference to the sale of his Union Pacific stock occurring on the sixth day of that month. It is not seriously contended that he did not on that date repudiate the transaction, as well as those of the eighth of August.

We are of the opinion that these facts do not show an intention on the part of the plaintiff, with a full knowledge of all the facts, to ratify the wrongful sale of his stock on the sixth of August. Before one is called upon to ratify any unauthorized transaction which has been undertaken for him, he is entitled to have all the facts put before him, and then he is entitled to a reasonable time in which to act before he can be compelled to take his position with regard to the transaction. (*Hopkins v. Clark*, 7 App. Div. 207, 213, and authority there cited.) The jury have found that the plaintiff did not, under the circumstances, ratify the act of the defendants in reference to the Union Pacific stock, and, were it not for an error in the charge to the jury, fixing an erroneous measure of damages, the judgment would be sustained.

The learned court in its charge to the jury, and by its refusal to charge as requested, fixed the measure of damages as the "difference between the prices at which the defendants sold the stock and the highest market price reached by the stock down to a reasonable time after the plaintiff received notice of the sale, together with interest on the difference." That is, the plaintiff was permitted to pick out the highest market price of these securities, at any time between the day of sale and a reasonable length of time after receiving notice; whereas the proper rule, as stated by the court in *Wright v. Bank of Metropolis* (110 N. Y. 237, 249), is that the plaintiff is entitled "to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it." What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts is a question of law. (*Wright v. Bank of Metropolis, supra.*) We are of opinion that the court did not err in holding that the thirty-first day of August in the same year was not an unreasonable extension of time within which the highest price might be ascertained. It appears from the record that under this charge the jury must have fixed upon some prices which prevailed intermediate the sale and the notice to the plaintiff of such sale. These prices are in excess of any shown to have been offered after such notice, and this was clearly prejudicial to the appellants.

For this reason the judgment appealed from should be reversed.

PATTERSON, P. J., and LAUGHLIN, J., concurred

INGRAHAM, J. :

I concur in the reversal of this judgment, but I think that the plaintiff was estopped from questioning the sale of the Union Pacific stock of which he received notice on the day after it was sold. The defendants, in making the sale of this stock, assumed to act as the agent of the plaintiff and made the sale for his benefit and on his account. Of that the plaintiff received notice with the reasons which induced the defendants to make the sale. It seems to me that if the plaintiff wished to disaffirm this sale he was bound to at once notify the defendants. He could not stand by without objec-



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tion and speculate upon the future course of the market and hold the defendants liable for a breach of their duty if the market went up, but ratify the sale and accept the transaction if the market went down. The price at which the stock was sold was, in this view, entirely immaterial. He had notice that the stock had been sold, that the defendants had assumed to act in selling it as his brokers and for his account, and that the sale would be an advantage to him, as, in their opinion, he would be able to subsequently repurchase the stock at a lower price.

All of the late cases that have discussed the relation between a broker and his customer in relation to carrying stock on margin treat an unauthorized sale of the stock as a violation of a contract between the customer and his broker to which the usual rules applicable to the relation of principal and agent apply. Thus, in *Baker v. Drake* (53 N. Y. 211) Judge RAPALLO says: "If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so." And in the case of *Wright v. Bank of Metropolis* (110 N. Y. 237) Judge PECKHAM, in speaking of the case of *Baker v. Drake*, says: "The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or, in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendants was illegal and a conversion, and that plaintiff had a right to disaffirm the sale and to require defendants to replace the stock;" and the court then applied the rule laid down in *Parsons v. Sutton* (66 N. Y. 92), which states the rights of the parties arising from a breach of a contract, that "the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care, or inexcusable negligence permit his damage to grow and then charge it all to the other party." The time within which a party must disaffirm an unauthorized sale of the stock, or in which he must repurchase in case the agent or broker refuses to repurchase the stock after the sale is disaffirmed,

is not the same. The plaintiff was informed that there had been great uncertainty as to the future of the market; that there had been failures among dealers and other failures were expected, and that in the opinion of the writer of the letter this stock would go lower. He was then placed in a situation in which he was bound to act promptly if he wished to disaffirm the sale, and he could not lie by and wait for future developments to see whether or not the sale would be advantageous or disadvantageous to him. He received this notice on the seventh of August. He was in reach of the defendants' office by telegraph or letter, and a communication would have been received by them within twenty-four hours from the time it was sent; but the first time that he communicated in any way with them was on the eighteenth of August, more than ten days after he received the notice of sale. It is not disputed but that each day, between August sixth and August twelfth inclusive, Union Pacific stock sold lower than the price at which the defendants sold it, and that the highest price at which it sold during those days was seventy-two. On the eighteenth day of August the stock had advanced to upwards of seventy-eight, and it was this price that it would appear that the jury allowed the plaintiff as the damages caused to him by the sale of the stock; but I think he was entirely too late in disaffirming the transaction, and that his delay in disaffirmance was an implied ratification, and that he cannot now recover for any damages for the sale of this Union Pacific stock.

HOUGHTON, J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

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Third Department, March, 1907.

JULIUS BRUSTMANN, Respondent, v. JOHN MOTRIE and Others,  
Appellants.

Third Department, March 13, 1907.

**Vendor and purchaser—Statute of Frauds—contract of sale by life tenant does not bind remaindermen not joining therein—facts insufficient to establish priority of contract—when vendee not entitled to set aside conveyance to subsequent purchaser.**

A written contract to sell lands executed by a life tenant but not by the remaindermen is not binding upon the latter, even though executed with their approval and the vendee is not entitled to set aside a conveyance made to another party.

Mere proof of the willingness of the remaindermen to sell their interest in connection with that of the life tenant does not establish a contract binding upon them.

When a vendee cannot hold a vendor under a void oral contract to sell lands, he has no greater right against the grantee of the vendor.

Evidence as to respective dates of agreements to sell lands to different parties examined and

*Held*, that the evidence established that the grantee's contract was prior in date. The mere fact that the vendors paid commissions to a real estate agent acting for a vendee does not establish that a valid contract with him was consummated, as a broker may be entitled to commissions on furnishing a purchaser whether or not the contract be afterwards consummated.

APPEAL by the defendants, John Motrie and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Ulster on the 15th day of August, 1906, upon the decision of the court rendered after a trial at the Ulster Trial Term, the jury having been discharged.

*John T. Cahill* and *Charles Irwin*, for the appellants.

*Chris A. Murray* [*John D. Eckert* of counsel], for the respondent.

SMITH, P. J.:

Prior to May 22, 1905, the defendant John Motrie was the owner of a life estate in certain property in the city of Kingston. His daughters, Margaret Motrie and Helen Motrie, were entitled to the remainder. Between eleven and twelve o'clock upon the said twenty-second day of May John Motrie entered into a written

agreement with this plaintiff to sell to him the said property for the sum of \$2,100 and to give to him a full covenant deed from himself and his two daughters. Upon the twenty-third day of May John Motrie and his two daughters executed a warranty deed thereof to the defendants Stanislaw and Lena Kreglowski. This deed was taken by the Kreglowskis with full knowledge of the contract between the plaintiff and John Motrie. After tender of the contract price this plaintiff brought an action against John Motrie and the Kreglowskis to compel the Kreglowskis to convey this property to the plaintiff. The learned court has held that through the sharp practice of the Kreglowskis in offering a higher price than was offered by Brustmann, John Motrie and his daughters were wrongfully induced to execute the deed upon the twenty-third and has directed them to execute a conveyance of the property to the plaintiff. There is evidence to the effect that upon the twentieth day of May the plaintiff or his wife had agreed upon the terms of the purchase both with John Motrie and with his daughters. No writing, however, was executed, and this informal agreement, clearly void under the Statute of Frauds, can in no way operate to give to the plaintiff any rights which he does not acquire under the written contract of John Motrie. The court has further found that the contract was executed by John Motrie not only with the authority, but with the approval of his daughters. The contract does not purport to be the contract of the daughters, and as to them the plaintiff had nothing except the verbal understanding which was later to be consummated by a written contract which was never executed. But this finding of fact is wholly without support in the evidence. At the time that this contract was executed the two daughters had already signed a contract to convey the property to the defendants Kreglowski. There is not one word of evidence of any authority given to John Motrie to execute for them a contract. The only evidence upon which it can be based is the evidence of the willingness of the daughters upon the twentieth to afterwards execute a conveyance to the plaintiff for the sum afterwards inserted in the contract with John Motrie. That no contract was made by Brustmann with these daughters is sworn to explicitly by Brustmann himself.

Without any contract then from these daughters, if the property

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had not been conveyed to the Kreglowskis, Brustmann could not have compelled the daughters to convey to him their interest in the property. He certainly has no greater rights against their transferees, the Kreglowskis, and were there no other facts affecting the rights of the parties this judgment would have to be reversed because it passes to this plaintiff, the interests of these daughters, which they never legally agreed to convey to him.

There are further facts, however, which furnish additional reason why the judgment cannot stand. Prior to the deed of Motrie and his two daughters to the Kreglowskis they had contracted to execute the deed for a consideration of \$2,250. The trial court has found that this contract was made after the contract between the plaintiff and John Motrie. Upon a careful review of the evidence, however, we are convinced that this finding is not sustained thereby. According to the evidence of the agent Keator and his mother, of the two daughters and of the defendants Kreglowski, this contract was executed upon Monday morning, the twenty-second of May, between eight and nine o'clock. The evidence of John Motrie himself rather tends to the same inference, although it is so unreliable that it cannot be made the basis of any finding of fact. He was a hard drinker, and himself swears that after nine o'clock he does not remember anything that happened upon that day. As against this positive testimony of six witnesses some declarations are sworn to, both of John Motrie and of one of the daughters, which would seem to throw some suspicion upon the defendants' claim that their contract was executed upon the morning of the twenty-second. These declarations on the part of the daughter are explicitly denied. One Hamilton was the agent who negotiated the sale to the plaintiff. After this transaction he was paid his commissions in full by the Motries. It is strongly insisted that the payment of these commissions is a concession of a consummated valid contract with Motrie. This inference is not authorized, however, as the broker would clearly be entitled to the commissions upon furnishing a purchaser whether or not a contract be afterwards consummated between them. There is no evidence which outweighs the positive testimony of the six witnesses as to the time of the signing of this contract. With the burden of proof upon the plaintiff to show that he had prior rights, we are convinced that the finding

that the plaintiff's contract with Motrie antedated the Kreglowskis' contract with Motrie and his two daughters is against the weight of evidence. If it be true then that this deed upon the twenty-third was executed in pursuance of a written contract made prior to the plaintiff's contract, the defendants Kreglowski were clearly within their legal rights, and by their deed obtained nothing to which the plaintiff was entitled.

The judgment must, therefore, be reversed upon the law and the facts and a new trial granted, with costs to appellants to abide the event.

All concurred.

Judgment reversed on law and facts, and new trial granted, with costs to appellants to abide event.

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EDWARD G. MUNSON, Respondent, v. JAMES SMITH WOOLEN MACHINERY COMPANY, Appellant.

Third Department, March 13, 1907.

**Sale — machinery not adapted for specified use — measure of damages of vendee — evidence — rental value of mill property.**

In an action for damages based on the failure of the defendant to furnish machinery adapted to manufacture successfully glazed cotton wadding, an allowance of interest upon the amount of damages is not authorized for the claim is not liquidated.

The value of labor furnished by the plaintiff without the request or consent of the defendant in installing the defective machinery is not recoverable as an item of damage.

When in order to effect the installment of the machinery the plaintiff handed his mill over to the defendant and lost the use thereof, the plaintiff may recover the loss of rental value when the machinery turns out to be defective for the purpose contemplated.

Although the contract relieved the defendant from damages for any delay caused by strikes, it is not entitled to the benefit of such clause when the machinery installed was not adapted for the use contemplated.

Moreover, such defendant failing to furnish proper machinery cannot have advantage of delay caused by changes in the plan made by the request of the plaintiff.

Although the installment of the machinery required only the reconstruction of part of the machinery of the mill, the plaintiff may recover the rental value of

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the entire mill if it were made useless during the period of construction, so that no other business could be carried on.

However, the proof of the rental value of the mill cannot be given by a witness whose information as to the horse power used was based wholly upon hearsay and who was not acquainted with the manufacture of glazed cotton wadding contemplated, and who actually bases his valuation upon the profit to be made.

Rental value, when taken as the measure of damages, excludes consideration of the cost of maintenance and a fair return for the money invested because of uncertainty.

**APPEAL** by the defendant, the James Smith Woolen Machinery Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 14th day of February, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of February, 1906, denying the defendant's motion for a new trial made upon the minutes.

Prior to November 12, 1902, the plaintiff was the proprietor of certain mills in the town of Waterford, Saratoga county, known as the Massasoit Knitting Mills. This mill was equipped as a seven-set knitting mill, and was operated by plaintiff from 1872 to November 12, 1902. Prior to November twelfth the plaintiff had decided to change his mill to a plant for the manufacture of glazed cotton wadding. With this in view he applied to defendant for machinery which would be sufficient for the manufacture of glazed cotton wadding. The agent of the defendant visited the mill, and thereafter the defendant made a contract, as has been found, to furnish for \$4,500 certain machinery which should be capable of the proper manufacture of glazed cotton wadding. This machinery was to be furnished in running order by the 1st day of February, 1903. It was provided, however, that the defendant should not be liable for delays caused by strikes. The machinery was not in fact furnished until the 5th day of April, 1903. From that date until the eighth day of May the defendant was at work endeavoring to fix its machinery so as to make it capable of the manufacture of glazed cotton wadding. This it failed to do within that time, and upon the eighth day of May the plaintiff notified the defendant that he considered the contract broken, and held the machinery subject to its order. Thereafter the plaintiff himself constructed some machin-

ery for the manufacture of glazed cotton wadding, which machinery was finished about the first of August of that year. Thereafter the plaintiff sued the defendant for damages for failure to furnish this machinery capable of the manufacture of this wadding. The jury gave him a verdict for the sum of \$1,730.79. From the judgment entered upon this verdict and from an order denying the defendant's motion for a new trial the defendant here appeals.

*Montignani & Elmendorf* [*John L. Henning* of counsel], for the appellant.

*John E. MacLean*, for the respondent.

SMITH, P. J. :

Assuming plaintiff's right to recover for breach of contract, the items allowed for the board of defendant's men, for express and freight charges, and cartage paid, amounting to \$277.15, are not questioned. As this was not a liquidated claim, nor capable of accurate ascertainment, we are unable to find any authority for the allowance by the jury of interest upon the amount of damages which they should find. It appears also that while the defendant was attempting to perform its contract some labor was furnished by the plaintiff. It does not appear that plaintiff was required to furnish this labor nor that there was any agreement on the part of defendant to pay for the same nor that it was performed on defendant's request. The allowance of the item of \$341.08, therefore, for the labor of plaintiff's men would seem to have been unauthorized.

The learned trial judge allowed the jury to find as an item of plaintiff's damages the rental value of the mill from February first, the date upon which it was to be finished, until May eighth, the date upon which the defendant was notified that the plaintiff deemed the contract unperformed, and further to August first, the date upon which new machinery was installed in the mill by the plaintiff himself. It is not easy in this class of cases to state a rule of damage which shall give fair compensation for injury sustained by a breach of such a contract as is here involved. From the failure to perform the contract the plaintiff has lost the use of at least part of his mill from November twelfth, when he handed the mill over to defendant for the installation of the machinery contracted for, until



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May eighth, when the jury has found that the plaintiff rightfully declared the contract forfeited. This period would seem to me to be the period for which the plaintiff might claim damage in the loss of rental value. Inasmuch, however, as the period is of substantially the same length as the period from February first to August first, for which damages were in fact allowed, the difference is not substantial, and for that alone the judgment should not be reversed. During this period from November twelfth to May eighth the work was in part delayed by strikes, for which delay the defendant under the contract was not to be held liable. But this contract contemplated the final furnishment of sufficient adaptable machinery, and having failed to perform its part of the contract defendant cannot claim the benefit of that part which exempted it from liability by reason of strikes. Further, it may be that some of this delay was caused by changes in the plan of the machinery to be furnished, made by the plaintiff himself, which would require longer time than was contemplated by the contract. To these changes, however, the defendant assented, and having failed to perform the contract to furnish machinery that would make this glazed cotton wadding, it is immaterial whether the delay has been caused by the attempted furnishment of the machinery first provided for or of parts contemplated by subsequent modifications of that original agreement.

A question is further raised as to the right of the plaintiff to recover as damage the rental value of the entire mill when the part to be reconstructed for glazed cotton wadding contemplated only the reconstruction of a part of the machinery in the mill which occupied a part only of the mill proper. There seems to be some evidence that the construction of this machinery, however, appropriated all of the power of the mill, so that during the course of construction it was impossible to use the balance of the mill for any purpose. If in the performance of the contract the whole mill was entirely occupied or so far occupied that no separate business could be run therein, it would then seem that a part of the injury was the loss of the rental value of the whole mill. If, however, part of the machinery was not to be reconstructed and part of the mill could have been continued in use as a knitting mill or for other

purposes it would seem to have been improper to have allowed the jury to charge against this defendant the rental value of the whole mill as part of the damage for the breach of this contract.

The principal obstacle, however, to the affirmance of this judgment lies in the plaintiff's proof of the rental value of this mill. This proof was attempted to be made by the witness North who had lived in Cohoes since 1851 and had owned a mill for the manufacture of knit goods in that place. He swears that fifteen years before he had been through the mill and had seen the machinery; that he only knew the horse power by what he had been informed and he did not testify to what he had been informed thereupon. He knew what machinery was there only from what the plaintiff himself had testified. He was not acquainted with the manufacture of glazed cotton wadding and did not know that there was a mill in the State of New York engaged in that business. Without knowledge of the rental of any mills for the manufacture of glazed cotton wadding he swears that a mill would be equally valuable for the manufacture of any textile goods and that the value of the rental of this mill for the purpose of manufacturing glazed cotton wadding would be twenty dollars a day. He swears that he places the rental value, not upon the income, but upon the cost of maintenance and a fair interest over on the money invested. He further swears: "It might produce an income and it might not. My idea of the rental value of that property, therefore, depends upon the cost of maintenance and a fair return on the investment, and not on whether it is worth more or less to manufacture glazed cotton wadding." The evidence of this witness as to the rental value of this mill was duly objected to, and after it was admitted and it further appeared as to the basis upon which he put the rental value, motion was duly made by counsel for the defendant to strike out the evidence as incompetent and that the witness was not qualified to answer. In my judgment the evidence should not have been admitted, or, if admitted, should have been thereafter stricken out on motion. It was not necessary to prove the rental value of that mill as a mill for the manufacture of glazed cotton wadding. At the time it was handed over to defendant it was fully equipped for the manufacture of knit goods. If the mill from November 12, 1902, to May 8, 1903, had not been wrongfully occupied by the

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defendant it could have been used through that period for the manufacture of knit goods, and evidence of its rental value for the manufacture of knit goods would have been more definite and a fairer estimate of the injury done to the plaintiff than any speculation as to what might have been its rental value for the manufacture of glazed cotton wadding. It appears, however, that the witness was basing his evidence of rental value upon the profit to be made. He swears unqualifiedly that he bases it upon the cost of maintenance and a fair return for the money invested. The reason stated by the authorities why the rental value should be taken as the measure of damage expressly excludes this item of proof or a fair return for the money invested as an element of damage because of its uncertainty. So that while the witness has designated his estimate as rental value, he shows by his testimony that he is giving evidence of fair profit which might have been made, which the law characterizes as too uncertain as a rule of damage. Moreover, it is impossible to conceive how one can estimate the rental value of a mill without knowledge of its power, nor would it be competent for a witness to base an estimate upon hearsay knowledge of power, especially when he fails to disclose what the information is upon which he is acting. The learned judge at one time ruled that it was improper for the witness to base his answer upon what had been sworn to by another witness as to what machinery was in the mill, but he allowed the question to be answered without any further evidence as to the witness's knowledge of what machinery was there, and the witness had not been in the mill in fifteen years. The defendant may rightfully complain, I think, of a verdict which is allowed to be based upon such evidence.

The judgment and order should, therefore, be reversed and a new trial granted, with costs to appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

WILLIAM W. NICHOLS and CLIVE McK. NICHOLS, Appellants, v.  
JOHN B. RILEY, Respondent, Impleaded with MARTIN V. B.  
TURNER, Defendant.

Third Department, March 13, 1907.

**Attorney and client — when attorney purchasing client's interests holds the same impressed with trust — demurrer to counterclaim raises sufficiency of complaint — truth of allegations of answer not considered in determining sufficiency of complaint — facts not stating counterclaim.**

Although a demurrer to an answer searches the record and raises an issue as to the sufficiency of the complaint, when the complaint has been held not to state a cause of action, the decision will be reviewed as if made upon demurrer to the complaint, and the truth of the allegations of the answer will not be assumed.

An attorney at law neither during the continuance of his employment nor after its termination can, without the client's consent, avail himself of the information so acquired and purchase property, the sale of which he was once employed to prevent.

When a complaint by clients against their former attorney alleges that the defendant promised in order to protect their interests to purchase certain life insurance policies on the life of the clients' father which were held by a trust company which was the guardian of the clients, and that the purchase was to be made for their account and benefit, and that to effectuate the purchase the clients assigned their interest to the defendant, but that the defendant neglected to purchase the policies when sold and bought in at public sale by the trust company, and that he afterwards secretly purchased the policies of the receiver of the trust company on its insolvency, it states a cause of action. The policies so purchased, in the hands of the defendant or his assignee with knowledge, are impressed with a trust for the benefit of the clients.

It is no defense to such action to allege that the defendant, as part of the transaction in which he purchased the policies, purchased also two deficiency judgments held by the trust company against the plaintiffs, which judgments he seeks to counterclaim, for if the policies be impressed with a trust so too the judgments.

APPEAL by the plaintiffs, William W. Nichols and another, from an interlocutory judgment of the Supreme Court in favor of the defendant John B. Riley, entered in the office of the clerk of the county of Clinton on the 3d day of August, 1906, upon the decision of the court, rendered after a trial at the Clinton Special

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Term, overruling the plaintiffs' demurrer to the counterclaims set forth in the amended answer of the said defendant Riley.

These plaintiffs prior to December 10, 1903, were the owners of four policies of life insurance issued by the Mutual Life Insurance Company of New York upon the life of William W. Nichols, their father, aggregating \$12,500. They were also the owners of another policy of life insurance issued by the Union Mutual Life Insurance Company of Maine upon the life of their father for the sum of \$5,000. These policies were held by the St. Paul Trust Company, a corporation carrying on business in St. Paul, Minn. The St. Paul Trust Company had been prior to this time the guardian of these plaintiffs, and these policies were held as security for the moneys which they had advanced to the plaintiffs as guardian. Upon the 10th day of December, 1903, these policies were sold by the said St. Paul Trust Company at a public sale, upon which sale they were purchased by the trust company itself. Thereafter the trust company went into the hands of a receiver, and upon the 20th day of April, 1905, the said receiver sold the aforesaid policies to the defendant John B. Riley, of Plattsburg. William W. Nichols, the father, died on the 29th day of July, 1905. The insurance companies stand ready to pay over the money due upon the policies. The defendant Turner claims the moneys as assignee from John B. Riley. The plaintiffs have brought this action asking for a decree of the court that John B. Riley and the defendant Turner hold these policies as their trustees, and ask to be allowed to be subrogated to whatever rights they have therein upon payment of the sum that John B. Riley paid therefor. The complaint alleges that John B. Riley had, prior to this December tenth, been the counsel and legal adviser of the father of the plaintiffs, and that prior to that time "and since then has acted and represented them (plaintiffs) as their attorney and counselor at law in various legal proceedings and actions, and given them advice as such, and had otherwise acted as their agent and representative in various business transactions." It is further alleged that by reason of this relationship John B. Riley became possessed of knowledge of all the facts in reference to these policies and the sum for which they were held as security; that prior to this tenth day of December these plaintiffs had negotiations with certain persons in Chicago for the sale of

their interests in the said policies, and that various offers had been made to them by the said persons for the purchase of their interests, "whereby certain great advantages would have inured to these plaintiffs;" that prior to the 10th day of December, 1903, the defendant Riley had represented to William W. Nichols, one of these plaintiffs, that he would purchase said policies, and that when purchased the interest of the plaintiffs would be protected by said Riley, "and stated in effect that these plaintiffs would realize nothing or receive nothing from said policies unless said policies were purchased by said Riley, and that said Riley would look out for and protect the interests of these plaintiffs in the said policies, and that said purchase would be for and on account of these plaintiffs and to their benefit and advantage, and requested the plaintiffs herein to execute and deliver to him assignments of their interests in and to said policies, stating that he could not effect such purchase of said policies unless he had such assignments;" that for the purpose stated the plaintiffs did deliver to said Riley assignments of their interests in said policies, which assignments the said Riley has ever since retained, and which assignments he now has. It is further alleged that in reliance upon the representations and statements of said Riley the plaintiffs neglected to take any steps to obtain purchasers for said policies; that the said Riley did not bid or purchase the said policies upon the sale upon December tenth, but that secretly, upon the 20th day of April, 1905, he purchased the policies of the receiver of the said trust company, and that he thereafter assigned them to defendant Turner, who took with full knowledge of the plaintiffs' rights, and that due tender had been made both to said Riley and said Turner of the amount paid by Riley upon the purchase of said policies, and the request for their assignment, which had been refused.

The complaint purports to set forth a second cause of action which states substantially the facts above stated, without the allegations as to the confidential relationship between the defendant Riley and the plaintiffs, but alleges that the promises made by said Riley to purchase said policies were fraudulently made without an intent to purchase the same. The prayer for relief is substantially for an equitable judgment declaring that these policies are held by said Turner in trust for plaintiffs, and that the plaintiffs are entitled

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to the proceeds thereof after payment of the amount paid by said Riley therefor. The answer of Riley, after making various denials and admissions, purports to set up two counterclaims. He in the first place denies that he had agreed to purchase the policies, as alleged in the complaint, or that he was owing any duty whatever to the plaintiffs to make the purchases for them. He admits that he purchased the policies upon the 20th day of April, 1905, of the receiver of the St. Paul Trust Company, and further alleges that at that time and as a part of said transaction he purchased two deficiency judgments held by the St. Paul Trust Company, one against each of these plaintiffs. These judgments in each case amounted to upwards of \$5,000. These judgments he seeks to counterclaim against the plaintiffs severally. To these two counterclaims the plaintiffs demurred upon the ground that they did not state facts sufficient to constitute a cause of action and that they are not of the character specified in section 501 of the Code of Civil Procedure. The court at Special Term did not pass upon the demurrer to the defendant's counterclaim but upon defendant's attack held that the complaint did not state facts sufficient to constitute a cause of action. The demurrers to the counterclaims were, therefore, overruled and the complaint was dismissed with leave to amend upon payment of costs. From the interlocutory judgment entered upon this decision the plaintiffs have appealed to this court.

*Wallach & Cook* [*Charles K. Allen* and *Garrard Glenn* of counsel], for the appellants.

*Weeds, Conway & Cotter* [*Frank E. Smith* and *Thomas F. Conway* of counsel], for the respondent.

SMITH, P. J.:

The defendant might well have asked for a more specific statement of the alleged agreement on the part of Riley, the attorney, as to who should advance the money, as to how much he should advance, and as to the conditions upon which such purchase was to be made. Having failed to ask that the complaint be made more definite and certain he cannot now complain that no cause of action is stated if, under the pleadings as they stand, any contract or any agreement could be proven which is fairly within the general allegations made.

While this is a demurrer to the answer, because that demurrer searches the record, the defendant has procured a holding that the complaint does not state facts sufficient to constitute a cause of action. In reviewing this question, however, we are to review it as though the decision were made upon demurrer to the complaint, and for this purpose cannot assume as true any of the facts stated in the defendant's answer.

It may fairly be inferred that Riley's assurance to the plaintiffs that he would purchase these policies and hold them for their benefit referred to the sale upon December 10, 1903. He had advised the plaintiffs that that was the only way in which they could obtain substantial benefit from the policies and had assumed to undertake to perform this office for them. In violation of his assurance he allowed their title to become divested by the sale, and afterwards, by secret agreement, purchased the property himself. Upon proof of these facts we are of the opinion that equity should impress a trust upon the policies in the hands of Riley or his assignees with knowledge as to the surplus of the fund over and above the amount paid therefor.

The defendant's contention is that after the sale of December 10, 1903, the plaintiffs' title was completely divested; that Riley's relation of trust or agency terminated, and Riley might thereafter deal with the property the same as though he had been a stranger. In my judgment it is not very material whether the agreement of Riley's related to a purchase at the sale upon December tenth or whether it was an assurance of a purchase at any time that they could be obtained. In either case I think that the subsequent purchase of Riley inured to the benefit of the plaintiffs. In *Downard v. Hadley* (116 Ind. 131) the head note in part reads: "An attorney who is employed to perfect or defend a particular title to land can not, either during the continuance of the employment or after its termination, without disclosing the facts to, and obtaining the consent of, his client, avail himself of information acquired, or which it was his duty to acquire, while in that relation, and purchase an outstanding title for himself, and set it up in hostility to that which he was employed to perfect or defend; on the contrary, a title so acquired enures to the benefit of the client or his vendee." In the opinion of the court it is said: "The obliga-



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tion of fidelity which an attorney owes to his client is a continuing one, so far as respects any matter which has once been professionally committed to the attorney's confidence, and when the matter involved is the title to land, good faith and public policy require that any existing adverse title which the latter may thereafter purchase shall be deemed to enure to the benefit of his client, or his, the client's, vendee." The case at bar is not the case of property dealt with by a trustee after the title had been lost to the *cestui qui trust* without fault of the trustee. Under the allegations of the complaint the divestment of title by the sale of December tenth was through the neglect or refusal of Riley to purchase said policies for the plaintiffs' benefit as he had agreed to do. If upon the day after the sale Riley had purchased this property from the trust company, which itself became the purchaser upon the sale, it would hardly be questioned that he would hold such title for the benefit of the plaintiffs. Having failed to perform his agreement upon December 10, 1903, he may be deemed to be owing a continuous duty to purchase those policies for the benefit of the plaintiffs in fulfillment of the assurance which he had given them. And when a year and four months thereafter he procured those policies, equity should declare that the purchase was made in pursuance of that duty which he owed to them which had for so long remained unfulfilled.

I am not at all sure that to reach this conclusion it is necessary to find a breach of duty on the part of the defendant Riley in failing to purchase at this sale on December tenth. Assuming for the argument that there were conditions to such purchase by reason of which he was absolved from making the purchase, could he, without his client's consent, have made a private purchase next day and obtained title to himself? The fidelity which an attorney owes to his client is to use every endeavor in his power to the advantage of his client. By failing to insist upon conditions, even without collusion, opportunity may be presented for a subsequent purchase by him to his private gain. Collusion itself is difficult to prove. It may well be held that to insure the utmost fidelity of an attorney he should be barred from ever after, without his client's consent, making private gain out of a sale which he was once employed to prevent. This rule may well be dictated by public policy and is in

accord with the jealous care the courts have taken to guard sacredly the relations of attorney and client. In *Ex parte James*, 8 Ves. Jr. 337, 352) application was made to restrain the solicitor of an assignee in bankruptcy from bidding at a bankrupt sale. The motion was granted. Lord ELDON, in writing in respect thereof, said: "With respect to the question now put, whether I will permit Jones to give up the office of solicitor, and to bid, I cannot give that permission. If the principle is right, that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor, and buying the property. Infinite mischief would be the consequence in a number of cases. On the other hand, I do not deny, that those interested in the question may give the permission. The rule is, that a trustee shall not become the purchaser, until he enters into a fair contract, that he may become the purchaser with those interested. \* \* \* No Court can say, *ab ante*, they will permit this." In *Carter v. Palmer* (8 Cl. & F. 657) a barrister had for several years been the general counsel of the plaintiff under a general retainer and had by reason of that relation acquired an intimate knowledge of his affairs. After the relations were ended he purchased some securities which were held by the plaintiff. The House of Lords held the barrister to be trustee for the plaintiff of the securities thus purchased. Lord COTTENHAM, in writing for the court, said: "From the earliest times down to the latest case in which I believe the subject has been discussed, which is *Taylor v. Salmon* (4 Myl. & C. 139), the rule in equity has been always recognized which would prevent a person in the situation of the appellant making such a purchase for his own benefit, whilst he continued to act as agent. *As the reason for this disability continues to operate after the employment has ceased*, the disability itself must continue unless a contrary rule has been established by decisions. But this is not the case but the very reverse." (See, also, *Peck v. Peck*, 110 N. Y. 64, 72; *Cuse v. Carroll*, 35 id. 385.)

If then the complaint is held to state a good cause of action we must decide what the Special Term has failed to decide, to wit, the issue raised by the plaintiffs' demurrer to the defendant's coun-

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terclaims. To these the plaintiffs have demurred on the ground that they do not state facts sufficient to constitute a cause of action, and also upon the ground that they are not of the character specified in section 501 of the Code. It cannot be held that they do not state facts sufficient to constitute a cause of action. By section 501 of the Code, however, a counterclaim must tend in some way to diminish or defeat the plaintiff's recovery. I am unable to see how these counterclaims in any way can tend to diminish or defeat the plaintiffs' recovery in this action. I cannot agree with the appellants' counsel that the complaint states a legal cause of action for deceit. It was evidently not the intention of the pleader when the complaint was drawn nor can such a cause of action be spelled therefrom. There are no appropriate allegations as to damage suffered in order to sustain such a cause of action. If these plaintiffs succeed in holding the defendant Riley as trustee of these policies, it is clear that the defendant would have no right of action upon these deficiency judgments. They would be deemed to be held in like trust with the policies. If they do not succeed in establishing this trust they must fail in their action, and the establishing of these counterclaims by the defendant will neither defeat nor diminish any judgment which they might obtain. If we are right in this view of the pleadings, it is unnecessary to determine whether the claims of the plaintiffs are so far several as to admit of several counterclaims.

The interlocutory judgment should, therefore, be reversed and the plaintiffs' demurrer sustained, with leave to the defendant to amend his answer upon payment of costs of the demurrer and of this appeal.

All concurred.

Interlocutory judgment reversed and demurrer sustained, with leave to defendant to amend answer upon payment of the costs of demurrer and of this appeal.

## HADDOCK, BLANCHARD &amp; COMPANY, INC., Respondent, v. JOHN C. HADDOCK, Appellant.

Third Department, March 18, 1907.

**Bills and notes — irregular indorser — when liable — sections 114 and 118 of the Negotiable Instruments Law construed.**

Subdivision 2 of section 114 of the Negotiable Instruments Law, providing that an irregular indorser, when the instrument is payable to the order of the maker, the drawer or bearer, is liable to all parties subsequent to the maker or drawer, does not purport to fix the rights of the various indorsers as between themselves. The latter liability is governed by section 118 of the act which provides that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise.

Hence, an irregular indorser of drafts who indorses in order to give credit to the acceptors under an agreement that he should be liable for goods furnished the acceptors, is liable upon his indorsement when the acceptors fail to pay.

SMITH, P. J., dissented, with opinion.

APPEAL by the defendant, John C. Haddock, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Broome on the 17th day of September, 1906, upon the decision of the court rendered after a trial at the Broome Trial Term, the jury having been discharged.

Haddock, Blanchard & Company was a corporation doing a wholesale coal business at Binghamton. The Lenape Coal Company, the Livingston Coal Company and the Montauk Coal Company were corporations retailing coal. The majority of the stock of those corporations was owned by John C. Haddock, the defendant. The plaintiff sold these several companies coal and in payment therefor signed drafts upon them for the amount of the consideration. These drafts were payable to the order of the plaintiff, which was the drawer. These drafts were accepted by the respective coal companies and thereafter and before delivery to the plaintiff were indorsed by the defendant Haddock. They were indorsed by him for the purpose of giving credit to the acceptors and under an agreement that he should become liable for the coal furnished by the plaintiff to the said companies. Among these drafts was one note in which one of these companies was the maker and the

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defendant was an irregular indorser. The indorsement of that note was made under the same circumstances and agreement. These drafts were discounted by the plaintiff and upon failure of the acceptors to pay the same they were duly protested and the plaintiff was compelled to take them up. This the plaintiff did, and now brings action against the defendant Haddock upon his indorsement. At Special Term the facts were found practically as above stated, and the defendant was held liable both upon the drafts and upon the note. From the judgment entered upon that decision this appeal is taken by defendant.

*M. Edward Kelley*, for the appellant.

*Israel T. Deyo* and *A. J. McCrary*, for the respondent.

KELLOGG, J. :

By section 114 of the Negotiable Instruments Law (Laws of 1897, chap. 612) the liability of an irregular indorser is defined. It is there declared: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker, or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Prior to the statute an irregular indorser upon a note was presumptively not liable to the payee.

Section 118 of that law provides: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

This statute is substantially a re-enactment of the law as established by the cases. (*Moore v. Cross*, 19 N. Y. 227; *Coulter v. Richmond*, 59 id. 478; *Culliford v. Walser*, 158 id. 65; *Davis v. Bly*, 164 id. 527.)

It is an exception to the rule that the terms or legal effect of a written instrument cannot be changed by parol. This case is squarely within the terms of section 118 and the above authorities. Subdivision 2 of section 114 of that statute does not purport to fix the rights of the various indorsers as between themselves, but declares that the irregular indorser is liable to all the parties subsequent to the "drawer," not subsequent to the "payee." The drawer, the payee and the indorser are different parties to a bill, but the same person may occupy all those positions upon it. This section does not refer to persons but to the parties to the bill. This statute, as the defendant construes it, destroys a legal right formerly existing under the rules of the law merchant, which rules section 7 preserves in any case not provided for by the statute; it should, therefore, be strictly construed. If it was the intent to prevent the payee from recovering against the indorser, he and not the drawer would have been mentioned. In any event the section does not purport to define the liability of one indorser to another. That matter is governed entirely by section 118. The two sections read well together, one as showing the position of the parties while the paper is with the public as a negotiable instrument; the other as defining the rights of the indorsers as between themselves where the negotiable character of the instrument is unimportant. The judgment should be affirmed.

All concurred, except SMITH, P. J., dissenting in opinion; SEWELL, J., not sitting.

SMITH, P. J. (dissenting):

Prior to the Negotiable Instruments Law an irregular indorser upon a note was presumptively not liable to the payee. Evidence was permitted, however, to show that he indorsed to give the maker credit with the payee and thus was liable to such payee. In *Daniel on Negotiable Instruments* (5th ed. § 711), it is stated that parol proof of the intentions of the parties was admitted in such a case for the reason that the position of the name upon the paper is one of ambiguity in itself. In no case, as I understand, is parol evidence admissible to vary the relations of the parties as defined by the paper. (*Martin v. Cole*, 104 U. S. 30.) In *Steele v. McKinlay* (L. R. 5 App. Cas. 754) it was held by the House of

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Lords, before the passage of the Bills of Exchange Act in England, that in a case similar to the case at bar the indorser could not be held liable to the drawer even upon parol proof that the indorsement was made for the purpose of giving the acceptor credit with him. (See, also, *Jenkins v. Coomber*, L. R. 1898, 2 Q. B. 168; 67 L. J. Q. B. 780; also *First National Bank of St. Charles v. Payne*, 111 Mo. 291; *Dubois v. Mason*, 127 Mass. 37.) At no time, therefore, under the common law was there authority for holding this defendant liable, even upon proof that the indorsement was for the purpose of giving credit to the acceptor.

But whatever may have been the law prior to the enactment of our Negotiable Instruments Law I can see no escape from the defendant's contention that that law absolutely fixes his liability upon the paper. The liability of an irregular indorser upon a promissory note payable to a third party is there stated in section 114 to be primarily a liability to the payee. I say primarily, because in the 3d subdivision of the same section it is permitted to show that he indorsed for the purpose of giving credit to the payee, to whom he would not then be liable. The liability of an irregular indorser upon a draft payable to the order of the drawer is explicitly defined in the same section, but no different liability is therein provided in case of an indorsement for the purpose of giving credit to the acceptor with a drawer. The omission could not have been unintentional. To my mind such omission convincingly negatives the legal liability of the defendant upon those drafts. This interpretation of the statute is not affected by the provisions of section 118, which provides that evidence is admissible to show the relations of indorsers among themselves, nor by section 55 of the same act (as amd. by Laws of 1898, chap. 336), which provides that an accommodation party is liable on the instrument to a holder for value. Both these sections are but declarations of the common law. *Steele v. McKinlay* (*supra*) was decided under the common law. If either of these sections could otherwise be held applicable they, as general provisions, must yield to the specific rule of liability imposed upon the defendant by section 114 of the act. It cannot be held that the Negotiable Instruments Law states only a rule of *prima facie* liability. One placing his name upon commercial paper has the right to rely upon the measure of his liability imposed by that act, and he

can be subjected to no greater liability by parol proof that the paper was executed with the intention of assuming such greater liability.

No case is cited in this State holding a contrary rule. Both the case of *Kohn v. Consolidated Butter & Egg Co.* (30 Misc. Rep. 725) and the case of *Corn v. Levy* (97 App. Div. 48) refer to the liability of an irregular indorser of a promissory note payable to a third party. That the liability of such an indorser is open to explanation by parol is explicitly provided for by subdivision 3 of the section.

If this defendant, for a valuable consideration, legally assumed payment of this debt by contract other than is evidenced by this draft, plaintiff might recover. Under the Statute of Frauds the signing of the draft would not be sufficient to fasten liability upon him unless his liability could be made to come within the law merchant, which is codified in our Negotiable Instruments Law. As to the drafts, then, I think the judgment erroneously charged the defendant therewith. As to the note, defendant was clearly liable under the Negotiable Instruments Law.

The judgment should thus be modified and as modified affirmed, without costs to either party.

Judgment affirmed, with costs.

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MARY K. HOAR, as Administratrix, etc., of ELIZA D. KERR,  
Deceased, Plaintiff, v. THE UNION MUTUAL LIFE INSURANCE  
COMPANY, Defendant.

Third Department, March 13, 1907.

**Insurance — provisions as to payment of premiums on life insurance construed — premium notes accepted by the insurer, but not paid, not effective as payment of premiums.**

In an action upon policies of life insurance it appeared that after two or more annual premiums had been fully paid the policy became a paid-up, non-forfeiture policy; that if the amount of any annual premium or interest due on any note taken in part payment of a former annual premium were not fully paid, the policy should be null and void and forfeited except as respects annual payments for prior years which have been fully made, and that if any note, check or draft shall be given in payment or part payment of any premium and such note, check or draft shall not be paid according to the provisions thereof, the



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policy became immediately void except as respects payments for prior years. It further appeared that of the first annual premium only sixty per cent had been paid, but for the remaining forty per cent of the premium a one-year note was given. Only sixty per cent of the second premium was paid and the principal of the former premium note was included in a new premium note also payable twelve months from date. Similar settlements were made each year for six years, the principal of each premium note being included in the principal of the new premium note taken for part payment of the premiums when due. The first premium note provided that if not paid at maturity all benefits which would have accrued for full payment became void and forfeited to the company. The subsequent premium notes did not contain said provision, but in accepting each note the surplus apportioned to the policy was deducted from the notes before the renewal note was given.

*Held*, that the beneficiary stood in no contract relations with the company except as she was entitled to reap the profits of performance by the insured;

That the premium notes were not payments, but merely means of securing payment, and effective only to extend the time therefor, and never having been paid the original indebtedness was revived and the beneficiary was not entitled to recover on the policies;

That although the later notes contained no provision as to forfeiture of benefits in case of non-payment, it was immaterial, as the failure to pay the later notes revived the former note containing such clause and deprived the beneficiary of rights under the non-forfeiture clause.

*Held, further*, that the insurer by accepting the notes of the insured from year to year did not thereby rely upon his personal responsibility and agree to pay the beneficiary in full, but was entitled to offset against the sum due under the policy any sum due from the insured.

SMITH, P. J., dissented, with opinion.

MOTION by the defendant, The Union Mutual Life Insurance Company, for a new trial under section 1001 of the Code of Civil Procedure after the entry of an interlocutory judgment in the office of the clerk of the county of Ulster on the 23d day of July, 1906, upon the decision of the court rendered after a trial at the Ulster Special Term.

The action is brought upon two policies of insurance upon the life of John W. Kerr, now deceased. The first policy was issued on July 1, 1869, for the sum of \$3,000, with an annual premium of \$213 due the first day of July in each year for ten years. This policy contained the following provision: "That after two or more of said annual premiums have been fully paid, this Policy becomes a Paid-up Non-forfeiture Policy, for an amount equal to the sum of

one-tenth of that hereby insured for each and every premium which shall have been so paid ; requiring no further payments of premiums, subject to no assessments, but entitled to its apportionment of the surplus accumulation in the ratio of its contribution thereto." The policy was payable to the wife of John W. Kerr, to wit, Eliza D. Kerr, her executors, administrators or assigns. The policy contained the following conditions: "*First*. That if the amount of any Annual Premium herein provided for, or the interest due on any note taken in part payment of a former annual premium is not fully paid on the day and in the manner so provided for, then this Policy shall be null and void, and wholly forfeited, except as respects annual payments for prior years, which shall have been promptly and fully made and the benefits of which are thus hereinbefore secured from forfeiture; *second*, that if, at any time, any Note, Check or Draft (other than the usual Premium Note for part of Annual Premium forborne) shall be given in payment or part payment of any premium then due or to become due, for or on account of this Policy, and such Note, Check or Draft shall not be paid according to the provisions thereof, then this policy shall become immediately void, and the Company be thereby released from all obligations under it, except as respects payments for prior years which shall have been promptly and fully realized by the Company in all respects, according to their terms, and the benefits of which are thus secured from forfeiture as above provided." The first annual premium of \$213 was settled July 1, 1869, in the following manner: Sixty per cent thereof was paid, one-fourth in cash and the balance of three-fourths in three promissory notes of equal amounts payable in three, six and nine months. These promissory notes were called cash notes. They were paid by Mr. Kerr and delivered up to him at maturity. For the remaining forty per cent of the premium Mr. Kerr gave his note for \$85 payable twelve months after date with interest. This note was also made out on a printed blank furnished by the company and was called a regular premium note. Upon July 1, 1870, the premium of \$213 was settled in a similar manner. Sixty per cent thereof was paid, one-fourth in cash and the other remaining three-fourths in cash notes, payable in three, six and nine months. The interest on the premium note of the prior year was paid in

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full, but the principal of such premium note was included in the new premium note, which was given for forty per cent of the premium due July 1, 1870, making the premium note for \$170 payable twelve months after date. Similar settlements were made each year for six years, the principal of each premium note being included in the principal of the new premium note taken for a part of the premium due at the time it was taken. The first three premium notes contained a provision, "That if the interest on this note is not paid annually, or the note itself at maturity, then all benefits which full payment in cash of said annual premium would have secured shall become immediately void and forfeit to said Company." The other three notes did not contain such provision. In each of the last four settlements certain sums aggregating ninety-five dollars, being the surplus apportioned to the policy, were deducted from the notes before the renewal note was given. Applying this amount in extinguishment of the two first premium notes would leave a balance remaining unpaid upon them of seventy-five dollars. After the sixth settlement of this nature two of the cash notes were paid. The third cash note was not paid, nor was the premium note or any interest paid thereupon; no other payments were made on the policy. The claim of the plaintiff is that under the policy the first five premiums were fully paid, and that upon the death of John W. Kerr, his widow, or her executors, as she died before he did, were entitled to five-tenths of the face of the policy. The policy provided: "Said Company shall have a right to setoff any demand they shall have against said assured, her assigns or representatives, arising incidentally to or in connection with this insurance against any claim for which this company shall be liable thereon." The contention of the defendant is that the failure to pay this cash note and the failure to pay this last premium note or interest thereupon constituted an entire forfeiture of all benefit under the policy, and that two annual premiums were not actually paid or received, and that the notes were a proper offset against any liability of the company upon the policy.

The second cause of action raised substantially the same questions. That was a policy taken out December 12, 1870, for \$5,000 upon the life of John W. Kerr. It was payable to his wife, Eliza D., but, in case of her previous death, to his surviving children. The

amount of the annual premium was \$362.25. These premiums were settled in the same way for five successive years: Neither the cash notes nor the premium notes given in December, 1874, nor any other premiums, were ever paid. The wife having died before John W. Kerr, the plaintiff holds the rights of the children by assignment. Upon this policy the plaintiff claims the right to recover as for four-tenths of the face of the policy. This claim the defendant disputes upon the ground that all benefits under the policy have been forfeited by failure to pay the cash notes and the premium note given in December, 1874. The court at Special Term held that upon the first policy the premium had been fully paid for five successive years within the meaning of the policy, and upon the second policy the premium had been fully paid for four successive years, and recovery was allowed as upon a paid-up policy, in the first case for five-tenths and in the second case for four-tenths of the amount of insurance. Interlocutory judgment was entered and this motion made under section 1001 of the Code of Civil Procedure for a new trial.

*John J. Linson and D. M. De Witt, for the plaintiff.*

*Moody & Getty [E. V. B. Getty, of counsel], for the defendant.*

**KELLOGG, J. :**

By the contract of insurance between the company and the husband, he agreed to make certain annual payments on each July first for ten years, in consideration of which it was to pay the wife the amount of the policy upon his death. Whether she would ever realize anything upon the contract depended upon the manner in which he performed his contract. She stood in no contract relations with the company, except that as the beneficiary of her husband she was to reap the benefits of his performance. Not one of the cash payments provided for by the policy was made by the husband. He gave his promissory note for a part of each. The giving of a debtor's note does not pay a debt. It may extend the time of payment, but if default is made in the payment of the note the original indebtedness is revived with all its incidents.

The non-forfeiture clause in the policy applies only where two annual premiums have been fully paid, and the provision as to pay-

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ment is made more certain by the further provision in the policy where, in speaking of the non-payment of a cash note, check or draft, it provides that upon such non-payment the policy shall be void "except as respects payments for prior years which shall have been promptly and fully realized by the Company in all respects according to their terms, and the benefits of which are thus secured from forfeiture as above provided." The provision in the premium notes that they shall not be allowed under the non-forfeiture clause as full payment until paid really adds nothing to the transaction. They were not payments, but were only means of procuring payment, and until paid were practically unimportant except to show extension of time for payment, but when past due they ceased to have any material effect. The maker had defaulted in his contract and could gain no benefit from his broken promise, but falls back upon the original contract, which he never has performed. But these notes make certain the understanding of the parties that after default they cannot give the delinquent any benefit under the non-forfeiture clause.

The neglect to continue this provision as to the non-forfeiture clause in some of the renewal notes does not benefit the plaintiff. Upon failure to pay such renewal note, the former note was revived with all its provisions and incidents; and clearly all notes containing this clause which are represented in the last renewal note cannot now be considered under the non-forfeiture clause. The long-continued default in payment of the last renewal note, representing an unpaid part of each annual premium on the policy, deprived the plaintiff of any benefit under the non-forfeiture clause.

If the clause in the policy that any claim that the company has against the assured may be set off against the amount due upon the policy relates only to a claim against the wife of the party making the contract, that clause would clearly indicate that none of the notes was intended as actual payment under the non-forfeiture clause.

The policy seems to draw a distinction between the words "insured" and "assured," treating the husband as the insured and the wife as the assured; but she had no dealings with the company, and it could not have any claim against her arising out of the policy. He had dealings with it, and naturally would be indebted to it on account of matters arising out of the policy. The words

"assured" and "insured" are so nearly synonymous that they are frequently used interchangeably. It is not probable that the company would accept the notes of the husband from year to year, relying upon his personal responsibility, agreeing to pay the wife the full amount of the policy, without the right to offset the notes. Any claim against the wife for any cause could be legally offset against the amount payable upon the policy. It is not probable that that right of offset was intended to be limited to a claim arising out of the policy only. Neither is it probable that the parties inserted this provision without intending that it should have some reasonable effect. The situation indicates clearly that it was the intention that any indebtedness on account of the policy should be an offset against any amount due upon it. In either view of the case there can be no recovery.

The judgment should be reversed on the law and the facts and a new trial ordered, with costs to the appellant to abide the event.

CHESTER, J., concurred; COCHRANE, J., concurred in result upon ground last stated; SMITH, J., dissented in opinion; PARKER, P. J., not voting, not being a member of this court at the time the decision was handed down.

SMITH, J. (dissenting):

In the policies themselves no provision is made authorizing the payment of these premiums otherwise than in cash. That such might be permitted, however, seems to have been contemplated by the conditions inserted in the policy relating to the non-forfeiture of any notes given for a part thereof. It is stipulated that the method of payment actually adopted was agreed to between the insured and the company, and the first question for our determination is, whether the inclusion of the principal of a premium note in each successive premium note constituted full payment of the premium within the terms of the non-forfeiture clause of the policy or that clause which provided for paid-up insurance to extend to so many tenths of the principal as were represented by the premiums fully paid. Primarily the payment of a premium by a promissory note which is afterwards included in renewal notes ought not to constitute such payment as to give to the insured the benefit of a provision in the policy which is only given to him upon the full payment of &

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premium. If, however, the company intended to accept these notes as full payment of the premiums it had the right so to do and it might lawfully contract to waive full payment in cash which in the policy is made a condition precedent to the right of the insured to claim a paid-up policy.

But the intention of the parties is to be gleaned not alone from the policy itself, but from all of the papers then executed. Among the papers executed upon each settlement when the premium was provided for was the premium note. Upon July 1, 1869, the premium note contained this condition: "And it is an express condition of the acceptance of this Note by the said Company in part payment of the annual premium for Policy No. 28615 — which condition is fully agreed to by the Promisor herein — that such acceptance shall in nowise affect the condition in said Policy respecting the forfeiture thereof in case of the non-payment of any other portion of said annual premium; and that if the interest on this Note is not paid annually, or the Note itself at maturity, then all benefits which full payment in cash of said annual premium would have secured, shall become immediately void and forfeit to said Company." In view of the condition contained in the note it seems clear that it was not the intention of the company to waive the payment in cash and to consider the part payment by the premium note as entitling the insured to such benefits as would come from the full payment of the premium unless such premium note were paid at maturity. The result of the transaction was simply this: The policy was continued in force for another year and if the insured died within that time the beneficiary would be entitled to the full benefit of the policy. Upon the giving of the premium note instead of the cash, however, in part payment of the premium the insured has in effect waived his rights under the non-forfeiture clause of the policy. If the premium notes given at the different settlements during the next five years had contained the same conditions it would have to be held as matter of law that the insured by failing to pay the same had waived the benefits of non-forfeiture which the policy assured to him in case of full payment of more than two premiums.

In the settlement of July 1, 1872, however, the premium note contained the condition first specified in the premium note of July

1, 1869, but the last condition therein specified, to wit, that if the interest on the note or the note itself is not paid at maturity all benefits which full payment in cash of said annual payment would have secured should become void and forfeited to the company, was omitted. The same is true of the premium notes given in 1873 and 1874. This omission could not have been unintentional. For the first three years the company required the insured to waive the benefit of the non-forfeiture clause if he would pay part of his premium with a premium note. Thereafter this waiver was not required of the insured. The inference is irresistible that thereafter the acceptance of the premium note was taken as full payment of the premium and was intended to give to the insured every benefit which the policy secured to one who had paid the full premiums thereupon.

This inference is strengthened by the acts and declarations of the defendant evincing its understanding that the receipt of these premium notes constituted full payment, except so far as such payment might be qualified by the terms of the notes. The notes recited upon their face that they were taken in *part payment* of the annual premium. The plan of payment of each premium by cash, cash notes and premium notes was designated in a receipt given to the insured as the "figures of 1870 settlement," etc., and in each year thereafter a receipt in similar terms was given to insured. Moreover, the policy itself acknowledges *payment* of the first year's premium, though payment was made by this agreed plan. The word "settlement," as used by this defendant, has received judicial construction in the case of *Stewart v. Union Mutual Life Ins. Co.* (reported in 155 N. Y. 266). Judge HAIGHT, in writing for the court, says: "Again, was the note accepted by the company in payment for the first year's premium? The cashier, in effect, states that it was. He says: 'Your note for \$123.10, given *in settlement* of premium due on pol. No. 93,094, will be due and payable,' etc. It was given in settlement of the premium. Bouvier defines 'settlement' to mean payment in full, so that it would seem that the company not only accepted the note in payment for the first year's premium, but in accepting it and holding it the company recognized the power and authority of Crane to so contract with Stewart." In each year the premium note of the former year was



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surrendered to the insured. In view of this surrender, of the recital in the note that it was taken in part payment, of the receipt stating that the giving of the notes constituted a "settlement" for each year, the change of the terms of the premium note by the omission of the condition that its payment should be essential to entitle the insured to the benefits of a paid-up policy, could only be intended either as a waiver of such condition or to mislead the insured. It must be borne in mind that this characteristic of the policy was its chief attraction and the company should be held to the utmost good faith in treating with the insured concerning the same. The court will presume a waiver rather than an intent to mislead.

The same reasoning applies to the second policy. The first premium notes contained the condition that a failure to pay the same would forfeit any rights guaranteed by the policy to one who had paid full premiums. From the premium notes thereafter given was omitted this condition.

The defendant further contends that at least these premium notes should be offset against the amounts found due upon the policy. The difficulty with this contention lies in the provision of the policy itself, which provides for an offset as against the amount due upon the policy of all claims against the *assured*. In the policy itself a distinction is maintained throughout between the insured and the assured. The premium notes were in no sense a claim against the assured, but were simply claims against the insured or his estate. The contract must be construed strictly against the insurer by whom the contract was drawn.

The defendant further contends that the significance which I attribute to the change in the terms of the premium note is not justified because the defendant without the right of set-off would be giving the full benefit of this policy to one who only paid in cash a part of the stipulated premium. In those policies made payable to the estate of the insured the right of set-off would exist which would fully protect the company. Furthermore, the taking of premium notes was not part of the contract of insurance and was wholly discretionary with the company itself, and the company might well protect itself by requiring full cash payments from those who were not responsible and from whose estates the premium notes could not be afterwards collected. The Special Term

had found as a fact that five premiums upon the first policy and four upon the second have been fully paid. That finding is, I think, sustained by the evidence and it follows that the interlocutory judgment entered should stand.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

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CLINTON D. BOUTON, as Trustee in Bankruptcy of DE WITT T. WHEELER, Respondent, v. DE WITT T. WHEELER and J. DOLPH ROSS, Defendants, Impleaded with JULIA T. HILTS and GEORGE S. HILTS, Appellants.

Third Department, March 13, 1907.

**Bankruptcy—pleading—when complaint sufficiently alleges capacity of trustee to sue—when causes of action not improperly united—jurisdiction of State courts.**

When in an action by a trustee in bankruptcy to recover property alleged to have been wrongfully transferred by the bankrupt, the complaint, after setting out bankruptcy proceedings filed in the District Court of the Northern District of this State and that the insolvent was by that court duly adjudged a bankrupt, states that the plaintiff was "duly appointed the trustee \* \* \* by an order duly made on the 16th of March, 1905," the capacity of the plaintiff to sue is sufficiently set forth, for the court may take judicial notice that there is but one clerk's office in the Northern District for New York in the Federal court. Nor is it material that it is not alleged that the order appointing the plaintiff was made by the creditors with the approval of the court or referee or by the court, for the inference is plain that it was made in the bankruptcy proceedings pending in the district and court stated.

Moreover, the pleading may be sustained under section 532 of the Code of Civil Procedure which provides that in pleading a judgment or determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made.

The complaint set forth three causes of action against the transferees of the bankrupt. The allegations considered, and

*Held*, that the causes of action were not improperly united, having arisen out of the same transaction and all stating facts sufficient to set aside a transfer contrary to the provisions of the Bankruptcy Act.

The Supreme Court has jurisdiction of an action brought to set aside an unlawful transfer of property by a bankrupt and to recover the same or the value thereof for the benefit of his creditors.

COCHRANE, J., dissented.

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APPEAL by the defendants, Julia T. Hilts and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tompkins on the 3d day of August, 1906, upon the decision of the court, rendered after a trial at the Tompkins Special Term, overruling the said defendants' demurrer to the amended complaint.

The plaintiff sues as trustee in bankruptcy of De Witt T. Wheeler, and it is alleged in the amended complaint that the latter filed a petition in bankruptcy in the office of the clerk of the District Court for the Northern District of New York, and on the 23d day of February, 1905, was by said court duly adjudged a bankrupt; that on the 10th day of February, 1905, and within four months before the filing of said petition the defendant De Witt T. Wheeler being insolvent, wrongfully and unlawfully made a transfer of all his property to the defendant George S. Hilts upon an agreement in writing which is attached to such complaint, which if enforced, would enable the defendant Julia T. Hilts, the wife of said George S. Hilts, who was a creditor of Wheeler, to obtain a greater percentage of her debt than other creditors of Wheeler of the same class. It is further alleged that the defendant Hilts on the 16th day of February, 1905, transferred the property so received by him from Wheeler to the defendant J. Dolph Ross, who thereafter converted the property to his own use; that in accepting such transfer from Wheeler and making such transfer to Ross the defendant George S. Hilts acted in his own behalf and also in behalf of his wife, whose agent he was in all such transactions and that they all had reasonable cause to believe that it was intended by such transfer to give an unlawful preference to said Julia T. Hilts; that the value of the property so transferred was \$3,900, and that the plaintiff has no other assets with which to satisfy the claims of creditors of the said Wheeler or any part thereof. It is also alleged "that the plaintiff was duly appointed the trustee in bankruptcy of the estate of the said De Witt T. Wheeler by an order duly made on the 16th day of March, 1905, and thereupon duly qualified as such; that the proper orders have been duly made by Hon. George S. Tarbell, referee in bankruptcy, having jurisdiction of this matter, directing the plaintiff to bring this action." The facts so far stated are alleged in substance as the first cause of action.

For a second cause of action the plaintiff realleges all the prior allegations and alleges that the transfer by Wheeler to George S. Hilts was fraudulent and unlawful and made without consideration, with the intent to defraud all the creditors of Wheeler, except Mrs. Hilts; that the transfer was accepted by George S. Hilts with the like intent and that he transferred the property to Ross, who accepted the same with full knowledge of all the facts above set forth and who thereupon converted the same to his own use, and that such transfer was made with intent to hinder, delay and defraud the creditors of Wheeler except Mrs. Hilts; and it is also alleged that said transfer to George S. Hilts was made for the ostensible purpose and upon his agreement annexed to the complaint to pay a certain note made by Wheeler for \$2,000, payable at the First National Bank of Dryden and indorsed by said Julia T. Hilts, and other notes aggregating \$2,800 in amount; that Wheeler was indebted to other creditors in an amount exceeding \$5,000; that George S. Hilts did not pay the said \$2,000 note, and that defendant Ross was well aware that he did not pay the same, and that said conveyance was made for the ostensible purpose of paying it and that said George S. Hilts was financially irresponsible; that Ross received said goods so fraudulently transferred by Wheeler to said Hilts and converted the same to his own use.

In the third cause of action the plaintiff realleges all the facts hereinbefore stated, and, further, that George S. Hilts entered into said agreement annexed to the complaint to pay said note for \$2,000, fraudulently and without intending to pay said note, for the purpose of obtaining the property of the defendant Wheeler without paying consideration therefor, and that he has not given any consideration for said property, and that he was at that time financially irresponsible, that on the sixteenth day of February he transferred the said property to the defendant Ross, who received and converted the same to his own use, with full knowledge of all the facts hereinbefore set forth and with intent to defraud the said Wheeler and the creditors of the said Wheeler. The plaintiff demands judgment that the transfer made by Wheeler to George S. Hilts and the transfer from George S. Hilts to Ross be declared fraudulent and void as against the creditors of Wheeler, and that the plaintiff recover of the defendants the sum of \$3,900.

The defendants George S. Hilts and Julia T. Hilts demurred to

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such amended complaint on the grounds that the court has not jurisdiction of the subject of the action; that the plaintiff has not legal capacity to sue; that causes of action have been improperly united, and for insufficiency. The court overruled the demurrer and the defendants Julia T. Hilts and George S. Hilts have appealed.

*T. E. Courtney* and *M. N. Tompkins*, for the appellants.

*Jared T. Newman*, for the respondent.

CHESTER, J. :

The demurrer for insufficiency and lack of capacity to sue is based upon the failure to definitely allege where or by what officer or court the order appointing the plaintiff as trustee in bankruptcy of the defendant Wheeler was made or where and when it was entered. The allegation is that he was "duly appointed the trustee \* \* \* by an order duly made on the 16th day of March, 1905." It may be conceded that under the authorities the allegation of a mere conclusion of law on which no issue could be raised is insufficient. (*Gillet v. Fairchild*, 4 Den. 80; *White v. Low*, 7 Barb. 204; *Bangs v. McIntosh*, 23 id. 591, 598; *White v. Joy*, 13 N. Y. 83, 86; *Secor v. Pendleton*, 47 Hun, 281.)

But the lack in definiteness for which the complaint is criticised in this respect is made up by fair and necessary inferences to be drawn from other allegations therein. It is alleged that the petition in bankruptcy was filed in the office of the clerk of the District Court of the Northern District of New York and that Wheeler was by that court duly adjudged a bankrupt. The court may take judicial notice that there is but one clerk's office in that district for that court. It is not like the Supreme Court of the State, which has as many clerk's offices of the court as there are counties in the State. The Bankruptcy Act (approved July 1, 1898) provides in section 44 (30 U. S. Stat. at Large, 557) that the creditors of a bankrupt estate shall at their first meeting after the adjudication in bankruptcy appoint one trustee or three trustees of such estate, and if the creditors do not appoint a trustee or trustees the court shall do so. Rule XIII of the General Orders in Bankruptcy (adopted by United States Supreme Court October, 1898) provides that the appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge. Under

subdivision 7 of section 1 of the Bankruptcy Act (30 U. S. Stat. at Large, 544) the word "court," as used in the act, is defined to mean "the court of bankruptcy in which the proceedings are pending, and may include the referee." Under the law there may be many referees in bankruptcy appointed, but the limits of the districts of each are designated (Bankr. Act [30 U. S. Stat. at Large, 555], § 34), and their jurisdiction is limited to their respective districts. (Id. § 38.) There is an allegation in the complaint that orders have been made by G. S. Tarbell, referee in bankruptcy, and that plaintiff was appointed trustee in bankruptcy "by an order duly made on the 16th day of March, 1905." While it is not stated that the order was made by the creditors with the approval of the court or referee, or by the court because of the failure of the creditors to act, the inference is plain that it was made in the bankruptcy proceeding pending in the northern district of New York and in the District Court of that district on the date named. The allegations of this complaint in this respect, it must be conceded, could well be more specific, but we think they are sufficient to require an answer. This view finds support in *Brenner v. McMahon* (20 App. Div. 3), which was an action brought by executors where the allegations of the complaint were that "Ellen McMahon died at the city of Brooklyn, leaving a last will and testament dated February 3, 1896, which was duly admitted to probate by the surrogate of the county of Kings on the 15th of February, 1896. \* \* \* That in and by said last will and testament the said Ellen McMahon duly appointed these plaintiffs to be the sole executors and trustees thereof, and on the said 15th day of February, 1896, letters testamentary were duly issued to these plaintiffs, who had duly qualified as such on the same day." The claim on demurrer was that the allegations were insufficient because of the absence of any allegation that the plaintiffs were appointed as executors in any proceeding before the court by any surrogate, or that letters testamentary were duly issued by any surrogate, but the court held the averments as to the letters, taken with the allegations relating to the making of the will appointing the plaintiffs as executors and the admission of the will to probate by the surrogate of Kings county, followed by the allegation that letters testamentary were duly issued to them, and that they duly qualified, to be sufficient.

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The pleading may also be sustained under section 532 of the Code of Civil Procedure, which provides that "In pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made."

The demurrer for improperly joining causes of action is founded upon the argument that a cause of action to recover property or the value thereof improperly transferred within four months before the filing of the petition in bankruptcy has been joined with one for fraud and one for conspiracy.

While isolated sentences in the complaint would be appropriate to an action for damages for fraud or for a conspiracy, yet it is apparent that the effort of the pleader has been simply, under the peculiar facts of this case, to state facts which, if proven, will be sufficient to set aside the alleged unlawful transfer and to recover from the defendants the property transferred counter to the provisions of the Bankruptcy Act or the value thereof. That being our view of this complaint, there has been no improper joinder of causes of action, as they all arise out of the same transaction or transactions connected with the subject of the action, are consistent with each other and affect all the parties to the action, and do not require different places of trial.

Regarding the action, as we do, as one simply for the purpose of setting aside the unlawful transfer of the bankrupt's property and to recover the same, or the value thereof, for the benefit of his estate, it is within the jurisdiction of this court. (*Jones v. Schermerhorn*, 53 App. Div. 494; Bankr. Act [30 U. S. Stat. at Large, 564], § 67, subd. e., as amd. by 32 id. 800, § 16; *Cook v. Whipple*, 55 N. Y. 150.)

The interlocutory judgment should be affirmed, with costs, with usual leave to defendants to answer on payment of costs of demurrer and of this appeal.

All concurred, except COCHRANE, J., dissenting.

Interlocutory judgment affirmed, with costs, with usual leave to defendant to answer on payment of costs of demurrer and of this appeal.

JOHN G. KELLY, as Administrator, etc., of JOHN H. KELLY,  
Deceased, Appellant, v. THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY, Respondent.

Third Department, March 13, 1907.

**Negligence — explosion of dynamite carried on railroad — master liable for negligence although negligence of fellow-servant contributes to injury.**

When an injury to a servant is caused partly by the negligence of a fellow-servant and partly by that of the master, the negligence of the fellow-servant does not excuse the master.

When it appears that the plaintiff, a brakeman, was injured by an explosion of dynamite resulting from a rear end collision, and that the car in which the dynamite was stored was next to the caboose of the forward train and was not provided with air brakes, as were the majority of the other cars, contrary to the rule of the railroad requiring that cars carrying explosives be first class in every respect and that they be placed as near the middle of the train as possible, the jury would be entitled to find that the master, by storing the dynamite in a car not equipped with air brakes, made it impossible for the decedent's fellow-servants to place the car in the middle of the train, and a nonsuit based on the ground that the injury was caused by the act of a fellow-servant is error.

COCHRANE, J., dissented, with opinion.

APPEAL by the plaintiff, John G. Kelly, as administrator, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Chemung on the 12th day of September, 1906, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case, upon a trial at the Chemung Trial Term, and also from an order entered in said clerk's office on the 12th day of September, 1906, denying the plaintiff's motion for a new trial made upon the minutes.

The action is one for damages for the death of plaintiff's intestate caused by the alleged negligence of the defendant. The deceased was the head brakeman on a "wild cat" train operated by the defendant. It was running west bound and following regular train No. 61 and was supposed to run about twenty minutes later than 61, which was a freight train made up at Scranton to run to Buffalo. On its way west train 61 stopped at Vestal station for water. This



took ten or twelve minutes. Just as it got in motion again the "wild cat" train ran into it in the rear while running at a speed of from twenty to twenty-five miles an hour and the compact between the two trains caused the explosion of 24,000 pounds of dynamite which was contained in the car situate next in front of the caboose in the rear of train 61. The intestate was killed by such explosion.

The defendant had promulgated rules for the transportation of high explosives which provided that cars for carrying such explosives "must be first-class in every respect" and "must be placed in their train as near the middle as possible." When train 61 was made up at Scranton it consisted of thirty-five cars, about twenty-five of which were equipped with air brakes and were placed in the train ahead of ten other cars which were not equipped with air brakes. The car loaded with dynamite was among the ten not so equipped and was placed third from the rear, there being another car between it and the caboose which was to be taken off the train at Binghamton. The train was made up at Scranton under the direction of the assistant trainmaster there. When it reached Binghamton it was disconnected at the junction of the air and the non-air cars and seven or eight cars were taken off on the head end of the train besides the one car at the rear end between the car of dynamite and the caboose, and about twenty-five cars were taken on, so that the train when it left Binghamton was composed of over fifty cars in which the car of dynamite was next to the caboose. It does not clearly appear in the evidence how the cars so taken on were equipped, but one witness stated that they were mostly air cars and were put on the head end of the train. The changes at Binghamton and the making up of the train there were under the direction of the conductor of train 61 aided by his crew. The train thus made up then proceeded to Vestal where the collision took place as before stated. There were two engines drawing the "wild cat" train, both at the head of the train, and deceased was riding in the cab on the left-hand side of the second engine.

Both engines were blown to pieces by the force of the explosion and several lives were lost. The accident happened before the passage of the Employers' Liability Act (Laws of 1902, chap. 600).

*II. H. Rockwell*, for the appellant.

*Halsey Sayles*, for the respondent

CHESTER, J.:

While it is not so stated in the record it is evident that the decision of the trial justice in dismissing the complaint was placed on the ground that the accident was caused solely by the negligence of a coemployee. The respondent claims this, and the appellant concedes that the evidence shows that the collision was caused either by the negligence of the engineer of the leading engine on the "wild cat" train in not seeing the train on the track in front of him or by the negligence of the crew of the train 61 in failing to send back a flagman the proper distance to warn the approaching "wild cat" train. Nevertheless it is apparent to us that if the case had been submitted to the jury it could have found that the explosion which killed the decedent was caused partly by the negligence of a coemployee and partly by the negligence of the master. If the facts should be so established the plaintiff would be entitled to recover under the rule of law that where an injury to an employee is caused partly by the negligence of another employee and partly by that of the master the negligence of the coservant will not excuse the defendant from the consequences of its own fault. (*Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546; *Strauss v. N. Y., N. H. & H. R. R. Co.*, 91 App. Div. 583)

The car in which the dynamite was loaded was furnished by the master. It was not a car equipped with air brakes. In a train composed of over fifty cars, only nine or ten of which were not so equipped, and the remainder of which were so equipped, it is manifest that the car of dynamite could not have been placed in the middle of the train, in compliance with defendant's rule, without having a large part of the rear portion of the train disconnected from the locomotive in such a way that the air brakes upon such part could not have been utilized in controlling the train. The jury could have found that the master, by providing this car for the transportation of dynamite, had put it beyond the power of its employees to comply with its rule with respect to the transportation of high explosives.

We think, therefore, that it was for the jury to say as matter of

fact whether the defendant used reasonable care in furnishing this car for the transportation of this large quantity of dynamite, and whether it was a proper one for that purpose under the circumstances, and one which its employees could have placed in the train where its rule required. The case appears to be brought squarely within the rule laid down in *Bernardi v. N. Y. C. & H. R. R. Co.* (78 Hun, 454). There, as here, the appeal was from a judgment of dismissal of the complaint and the injury caused by the explosion of dynamite being transported on one of the defendant's cars, and the court said: "It was the duty of this defendant to exercise due care to provide proper cars and means for transporting this powerful explosive over its road, and it cannot escape liability for damages caused by the failure to exercise such care by delegating its, the master's, duties to an employee of inferior grade who happened to be a co-laborer with the person injured." It was a question there as to whether the explosion was caused by sparks from the locomotive coming in contact with dynamite being transported on a flat car, and the court said that the jury might have found "that the explosion was caused by the sparks from the locomotive, and they might have found that the defendant did not exercise due care to furnish safe means for the transportation of this explosive; \* \* \* and if it shall be found as a fact that the car used was unsafe and unfit for the transportation of this explosive, and that the defendant negligently permitted it to be used for that purpose, the plaintiff will be entitled to a verdict."

We think on the authority of that case there was a question for the jury, and that there should be a new trial.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except PARKER, P. J., not voting, not being a member of this court at the time this decision was handed down, and COCHRANE, J., who dissented in an opinion.

COCHRANE, J. (dissenting):

The reversal is based on the authority of *Bernardi v. N. Y. C. & H. R. R. Co.* (78 Hun, 454). In that case the explosive was conveyed on a flat car so near to the locomotive as not to be protected from the sparks therefrom, and it was held that

it was a question for the jury whether the defendant exercised due care to furnish safe means for the transportation of this explosive. Assuming in the case before us that the car on which the dynamite was being transported did not comply with the defendant's rule that it should be "first-class in every respect" for the reason that it was not equipped with air brakes, nevertheless such rule was supplemented with another rule that cars for carrying such explosives "must be placed in their train as near the middle as possible." It clearly appears that this latter rule was disregarded by the defendant's employees. If it were necessary that the air brakes on all the cars equipped therewith should be used, nevertheless it was possible to place the car in question considerably nearer the center of the train. But the evidence shows that air brakes could be disregarded and cars equipped therewith could be used without reference thereto and thus placed at the end of the train, and no reason appears why that could not have been done in the train in question and the car of dynamite placed in the center of such train. In any event, as above stated, such car could have been placed much nearer the center. There seems to have been a clear disregard of a rule which if observed would have prevented such consequences as resulted from the accident in question. Were it not for the rule as to the placing of this car as near the middle of the train as possible and the failure of defendant's employees to comply with such rule, perhaps the *Bernardi* case would be applicable. But it falls short of reaching the present situation. It is idle speculation and guess work to reason that if this car had been equipped with air brakes it would have occupied any other position in the train.

I think, therefore, the judgment should be affirmed.

Judgment reversed and new trial granted, with costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. TROY  
CHEMICAL COMPANY, Respondent.

Third Department, March 13, 1907.

**Corporation — action to dissolve corporation under section 1785 of the Code of Civil Procedure — when Attorney-General acts in good faith — dissolution decreed when statutory facts admitted.**

When an action to dissolve a corporation is brought by the Attorney-General under section 1785 of the Code of Civil Procedure upon the ground that the defendant has remained insolvent and has failed to discharge its notes for one year, after a hearing upon notice to the defendant in which the insolvency and the failure to pay the notes were admitted, the action is justified, and it cannot be said that it was not brought in the discharge of a public duty and in good faith.

Where the answer admits that the defendant suspended its ordinary and lawful business for more than a year owing to bankruptcy proceedings brought against it, a dissolution of the corporation under the statute is proper.

So, too, a dissolution is proper when the corporate notes have not been paid for more than one year although the corporation has been discharged in bankruptcy, the discharge not operating as payment or protecting the corporation from an action to dissolve it.

Whether or no the court may exercise its discretion in an action for the dissolution of a corporation, when the plaintiff has shown the statutory requisites for a dissolution, a decree thereof should be granted.

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Rensselaer on the 15th day of October, 1906, upon the decision of the court, rendered after a trial at the Rensselaer Trial Term, a jury having been waived, dismissing the complaint upon the merits.

The action was begun by the Attorney-General in behalf of the People to secure the dissolution of the defendant corporation under subdivisions 1, 2, and 3 of section 1785 of the Code of Civil Procedure. The grounds stated in the complaint upon which the dissolution was sought were that the defendant has remained insolvent for at least one year; that it has neglected and refused for at least one year to pay and discharge its notes, and that it has suspended its ordinary and lawful business for at least one year. In the answer the allegations of defendant's insolvency and of its failure

to pay its notes were denied. It was also alleged as an excuse for its suspension of business that proceedings for the voluntary dissolution of the defendant in the Supreme Court of the State were instituted and also that proceedings in involuntary bankruptcy against it in the United States District Court had been taken and its assets seized. It was also alleged that its estate had been administered in these proceedings and that a discharge in bankruptcy of the debts of the defendant had been had and that the action was not instituted for public purposes.

The defendant was a domestic corporation organized in 1898, having its principal place of business at Troy. Among its assets were two formulas for medicinal preparations, one called "Pixine," and one called "Save the Horse." The trustee in bankruptcy of the defendant sold the "Pixine" formula and the exclusive right to the use of the trade mark therefor to one M. Arthur Wheeler, who was a stockholder and vice-president of the defendant. All the other assets of the defendant, including the formula "Save the Horse," were sold by the trustee in bankruptcy to one Edgar C. McKallor. The latter with his associates formed a new corporation with its principal office at Binghamton under the same name as that of the defendant, viz., The Troy Chemical Company.

The action was tried by the court which found among others the facts hereinafter stated. On March 14, 1904, a majority of the directors of the defendant instituted a proceeding for the voluntary dissolution of the defendant because of its insolvency, pursuant to the provisions of the Code of Civil Procedure. (See Code Civ. Proc. § 2419 *et seq.*) By the schedule attached to the petition in said proceeding the total demands of the creditors of the defendant were stated to be \$11,930.14, and the total value of all its property to be \$7,892.83. A temporary receiver of the defendant was appointed in said proceeding, who qualified on March 14, 1904, and took possession of all the property of the defendant and continued the business until May, 1904. On May 10, 1904, three of the creditors of the defendant filed in the office of the clerk of the District Court of the United States for the Northern District of New York, a petition in involuntary bankruptcy against the defendant. Such proceedings were had therein that on June 18, 1904, an adjudication was made adjudging the defendant to be bankrupt,

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and a trustee in bankruptcy of the estate of the defendant was appointed who qualified by filing his bond on the 28th day of July, 1904, and all the property and assets of the defendant were turned over to him and he continued the business for about four weeks from that time and in doing so bought and sold property. On September 2, 1904, such trustee sold all the assets of the defendant except the cash and deposits in bank. Such assets when reduced to money amounted to \$19,945.45; the debts and liabilities of the defendant as ascertained in said bankruptcy proceedings were \$16,729.21. The expenses of said bankruptcy proceedings were such that after the payment thereof by the trustee the remaining assets were insufficient to meet the liabilities, the deficiency being \$1,600. An order was duly granted by the United States District Court on April 3, 1906, discharging the defendant from its debts. In the month of December, 1903, the defendant executed two promissory notes aggregating \$2,500 in amount, which became due and payable in the month of January, 1904. Said notes were transferred before maturity to the Union National Bank of Troy, which bank remained the owner and holder thereof at maturity and until June 15, 1905, neither of which have been paid by the defendant.

The court rendered judgment dismissing the complaint on the merits, and from that judgment this appeal is taken.

*Julius M. Mayer and Hinman, Howard & Kattell*, for the appellant.

*William W. Morrill and Andrew P. McKean*, for the respondent.

CHESTER, J.:

It is claimed by the defendant that McKallor caused this suit to be instituted to take the life of the defendant for the purpose of leaving his company, of the same name, the only one in existence, and that the action is not for a public but for a private purpose. A sufficient answer to this contention is that the action was instituted by the Attorney General in the name of the People under a provision of the Code of Civil Procedure authorizing him so to do. (Code Civ. Proc. § 1786.) It appears that the action was so begun

by the Attorney-General upon the verified application of McKallor, who was a creditor of the defendant, after a hearing thereon before a Deputy Attorney-General, upon notice to the defendant, upon which hearing defendant appeared by its attorney, who conceded that the facts stated in the complaint were true. The Attorney-General, therefore, was fully justified in commencing the action, and nothing appears to indicate that it was not brought in the discharge of a public duty and in entire good faith on his part.

It was admitted in the answer that since the time of filing the said petition in bankruptcy (May 10, 1904), the business of the defendant had not been conducted. The action was commenced February 13, 1906, and the answer was dated April 20, 1906. This admission alone shows that the defendant had suspended its ordinary and lawful business for more than a year, which is one of the reasons assigned in the statute for which a judgment dissolving a corporation may be had.

Another ground for a judgment of dissolution is where a corporation has neglected or refused for at least one year to pay and discharge its notes or other evidences of debt. It is true that the notes held by the Union National Bank of Troy so far as they have not been paid by dividends from the bankrupt estate, have been discharged in bankruptcy, but such a discharge is not a payment of the notes. (*Dusenbury v. Hoyt*, 53 N. Y. 521.) The Legislature has seen fit to provide that a corporation must "pay and discharge" its obligations to save itself from being subjected to an action of this character. That it has not done and it has allowed these notes to remain outstanding and unpaid for more than one year. The fact that it has received a discharge in bankruptcy cannot avail to save its corporate life, for the statute has decreed otherwise. (Code Civ. Proc. § 1785, subd. 2.)

We need not go into the question as to whether or not the learned trial court was correct in its conclusion that the defendant was not insolvent under the facts found, for the other two reasons are sufficient to require a reversal. The defendant, however, claims that the statute is simply permissive and that the court may or may not, as it deems wise in the exercise of its discretion, award judgment dissolving a corporation, even though facts justifying its dissolution may be found.



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Even if it should be assumed that the court had some discretion in actions of this kind, it would evidently not be a proper exercise of it, when a cause of action is clearly established, for the court to prevent the law from taking its course and from being made effective. The plaintiff, having shown facts which under the law are clearly sufficient to sustain an action dissolving a corporation, should have been awarded a judgment for that purpose.

The judgment should be reversed on the law and on the facts and a new trial granted, with costs to the appellant to abide the event.

All concurred, SMITH, P. J., and KELLOGG, J., in result.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

CHARLES E. BALDWIN, Appellant, v. SCHENECTADY RAILWAY  
COMPANY, Respondent.

Third Department, March 13, 1907.

**Negligence — injury to motorman by collision — failure of master to conform to rules.**

The plaintiff was a motorman on the electric railroad of the defendant and was injured by a head-on collision at night. Usually the defendant operated two tracks, but at the time of the accident a portion of one of the tracks was torn up for repairs, and cars passing in both directions were required to use one track for a short distance. The rules of the defendant required the motorman and conductor to follow the time tables as posted, and stated that they would receive notice of temporary changes in the time tables by notice posted the day before they became effective. The rules also required the motorman to obey the instructions of the conductor. The time tables as posted required the run to be made in one hour, but through his conductor the plaintiff had been instructed to make the run in forty-five minutes during certain hours of the night, which schedule was never embodied in the time tables or notice thereof posted. The plaintiff, while running on the forty-five-minute schedule as directed, came into collision with a work car coming from the opposite direction upon the part of the road where a single track was used. The operators of the work car testified that they had no notice of the change in schedule. On an appeal from a nonsuit,

*Held*, that as the conductor and the plaintiff had been instructed to run on the forty-five-minute schedule, the jury would have been entitled to find that the master was responsible for the change in the schedule time;

That when only one track became available for use by cars moving in both directions it became the duty of the defendant to use reasonable precaution to protect its employees commensurate with the unwonted danger;

That the jury would have been entitled to find that by changing the schedule time, without giving notice thereof to employees, the defendant had violated its own rules, and was liable.

That although the headlight of the car had gone out, and the plaintiff, unable to fix it, had hung a red lantern in its place, he was not guilty of contributory negligence in failing to notify the conductor thereof.

APPEAL by the plaintiff, Charles E. Baldwin, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Schenectady on the 30th day of December, 1905, upon a nonsuit granted by the court on a trial at the Schenectady Trial Term.

*Lee & Senior* [A. G. Senior of counsel], for the appellant.

*Daniel Naylor, Jr.*, and *Edward C. Whitmyer*, for the respondent.

COCHRANE, J. :

The defendant operates a double-track electric railroad between Albany and Schenectady. The plaintiff, being in the service of the defendant as a motorman, was injured in a collision which occurred between four and five o'clock in the morning of September 5, 1903. Asserting that the collision was occasioned by the defendant's negligence, he seeks by this action to recover damages for such injuries.

At the time of the accident and for several weeks prior thereto and for a distance of a little more than half a mile near the Schenectady terminus of the road one of the tracks had been removed for the purpose of making repairs and consequently at such time and place cars were being operated in both directions over one track. The collision occurred on this single track between a passenger car operated by the plaintiff traveling toward Schenectady and a work car traveling in the opposite direction.

The rules of the defendant provided that conductors and motormen should receive their instructions from the superintendent or his authorized representative; that the motormen were under the directions of the conductor and should obey his orders so far as reasonable; that conductors and motormen should conform to time

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tables in running cars and be particular in making time points as laid out on the time cards; that time tables would be posted at all stations for the government and information of employees; that employees would receive notice of temporary changes of time tables by the posting thereof at all stations; that they were expected to keep themselves posted concerning current time tables and all changes thereof; that new time tables would be posted on the day previous to their becoming effective; that temporary changes of time tables were likely to occur at any time; that special instructions would be issued from time to time as might be necessary and that such instructions posted on the various bulletin boards whether in conflict with the rules or not should be fully observed; that bulletin boards should be consulted before starting and at the end of each day's work; and that employees should always have a copy of the rules at hand while on duty and be familiar therewith.

According to the time tables as published by defendant the running time between Albany and Schenectady was one hour. There is evidence, however, that for about a year prior to the accident a car known as the all-night car had been accustomed between twelve-forty-five and six-forty-five o'clock in the morning to make the trips from Albany to Schenectady in forty-five minutes. No change was made in the time tables as published, nor, so far as appears, was any information promulgated as to the change in the running time of this car.

About three weeks before the accident plaintiff was assigned to this all-night car by the assistant superintendent of the defendant, who was accustomed to give instructions to the motormen and conductors as to the movements of cars. Plaintiff testified that he at that time asked the assistant superintendent about the car making the trips in forty-five minutes, and was by him referred to the conductor of the car for instructions; that the conductor told him to make the trips in one hour until twelve-forty-five in the morning and from that time until six-forty-five in forty-five minutes. Plaintiff immediately began making the trips pursuant to such instructions and continued to do so until the accident. According to the forty-five-minute schedule he was due at the place where the accident occurred.

The complaint having been dismissed the plaintiff is entitled to

the most favorable inferences properly deducible from the evidence. From the evidence that this all-night car for about a year had been accustomed between twelve-forty-five and six-forty-five o'clock in the morning to make the trips from Albany to Schenectady in forty-five minutes, and from the plaintiff's testimony that the assistant superintendent of the defendant, who gave directions as to the movements of cars, when applied to by plaintiff for instructions as to making the trips in forty-five minutes referred the latter to the conductor who instructed plaintiff to so make the trips in forty-five minutes during the morning hours as aforesaid, it would have been a proper inference by the jury that the defendant had authorized or was responsible for such change in the running time from one hour to forty-five minutes. The learned trial justice properly held on this branch of the case that the evidence tended to show that the running time of this car had been changed by the defendant. He seems, however, to have been influenced in dismissing the complaint by the idea that there was no evidence that the crew of the work car had not been apprised of the change in the running time of plaintiff's car, or that such crew was proceeding on the theory that plaintiff's car would not arrive at the time and place of the accident. On the contrary, both the conductor and motorman of the work car testified that they had received no notice that the all-night car was being operated on the forty-five-minute schedule. It is true that after the learned trial justice had indicated the disposition which he thought should be made of the case the conductor of the work car was recalled and testified that for several days prior to the accident he had seen plaintiff's car arrive ahead of the published schedule time. But that did not tend to show knowledge on his part that the running time had been changed by defendant. It was his duty to proceed according to the time tables as published according to the defendant's rules. His natural inference would be that plaintiff was running ahead of time and not that the running time had been changed. He testified that according to the schedule time as published the work car would have passed over the single track before plaintiff's car was due to arrive.

Of course as long as defendant operated its cars over double tracks throughout the entire length of its road there was little or no danger of an accident such as the one in question. But when it

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began to operate its cars in opposite directions over the same track a new situation was created fraught with additional dangers to its employees. It then became the duty of the defendant to take reasonable precautions to protect its employees commensurate with such unwonted danger. It was incumbent on the defendant either by the promulgation of time tables or by other suitable methods or regulations to operate its cars with a view to the safety of its employees. (*Rose v. Boston & Albany R. R. Co.*, 58 N. Y. 217, 221; *Slater v. Jewett*, 85 id. 61, 71.) In *Hankins v. New York, Lake Erie & Western R. R. Co.* (142 N. Y. 421) it is said: "It is the duty of the master not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered and by which the trains are run shall not necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary and is the duty of the master." In the cases cited variations had been made in the schedule time in particular instances and for special reasons, but the principle certainly holds equally good where as in this case a permanent change in the schedule had been effected.

The rules of the defendant as published were all that could be required. The defendant can be subjected to no unfavorable criticism because of the inadequacy of the rules. Its culpability rests in the fact that it disregarded and violated its own rules, if as the jury might have found it changed the schedule time of the plaintiff's car while not publishing such change or giving notice thereof in any manner to its employees. Plaintiff of course knew that no change had been made in the schedule time as published. But he had a right to assume that in some other way the defendant was observing the duty which it owed him. The evidence is that prior to twelve-forty-five o'clock in the morning, men with signals were stationed at each end of the single track to guard against just such an accident as this. Plaintiff might properly assume that in some other appropriate way some means were being taken by defendant to protect him from such an accident. During all the time that this car was being run on a forty-five-minute schedule the defendant through its published time tables was informing its employees that the running time was one hour, and seems to have taken no

precaution to counteract the information thus promulgated. I think the question of defendant's negligence should have been submitted to the jury.

While making the trip in question the headlight attached to plaintiff's car went out. He stopped, attempted without avail to adjust it, hung out a red lantern in place thereof, and then proceeded. It is now claimed that he was negligent in not informing his conductor of the absence of the headlight. There is no suggestion as to what the conductor would or could have done which was not done by plaintiff; nor is it apparent how this negligence of the plaintiff, if such it was, contributed to the accident.

The judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred; KELLOGG, J., not sitting.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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JAMES C. B. FISHER, Respondent, v. CENTRAL VERMONT RAILWAY COMPANY, Appellant.

Third Department, March 18, 1907.

**Negligence — injury at railroad crossing — inconsistencies between testimony on first and second trial.**

When a judgment in favor of the plaintiff, who was injured while crossing a railroad track, was reversed upon the ground that on his own testimony he was guilty of contributory negligence in failing to look, and on the new trial he directly contradicts his former testimony on that point without explaining the contradiction and without corroboration, there is such an irreconcilable variance between the two statements that the plaintiff fails to sustain the burden of proof.

CHESTER, J., dissented.

APPEAL by the defendant, the Central Vermont Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Clinton on the 1st day of May, 1906, upon the verdict of a jury for \$7,500,

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and also from an order entered in said clerk's office on the 24th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Shedden & Vert* [*L. L. Shedden* of counsel], for the appellant.

*Gaylord T. Ames* [*John H. Booth* of counsel], for the respondent.

COCHRANE, J. :

Plaintiff has recovered a second verdict for personal injuries due to the defendant's alleged negligence. The judgment entered on the first verdict was reversed, the opinion of the court being reported in 109 Appellate Division, 449. The facts are there stated in detail. Repetition thereof is here unnecessary.

At the first trial plaintiff testified that as he crossed track 2 in front of the mail car he looked north and was just turning to look south as he stepped in front of the engine on track 3 and was struck by said engine. He had ample opportunity to look north when he was at the end of the mail car, and it was held on the former appeal that he was negligent in not looking south until just at the instant when he was struck by the engine on track 3.

At the last trial plaintiff testified in effect that he began looking south when between the rails of track 2 and continued looking south until the collision. We have, therefore, the plaintiff at the first trial directly contradicting the plaintiff at the second trial on a question of vital and controlling importance. No satisfactory explanation of this contradiction is proffered, and there is no corroboration on this crucial branch of the case. It is, of course, possible that plaintiff was mistaken in his first testimony. The natural inference, however, is that such testimony was probably correct. His recollection was then certainly as good as subsequently, and the first narrative would naturally be more artless and spontaneous, given as it was before it was subjected to the test of criticism and before its fatal effect on his chances of recovery had been revealed on the former appeal.

In my opinion in view of the irreconcilable variance between the two statements, the latter given as it was after plaintiff's mind had been illumined as to the nature of the testimony essential to a recovery, the plaintiff did not sustain the burden of proof on this

branch of the case. This in the first instance was of course a question for the jury, but the verdict of a jury is subject to judicial review and when the court can plainly see that the verdict rests on no substantial basis such verdict should be set aside. In passing on this important question the jury had before them absolutely nothing save two contradictory statements of the plaintiff each sworn to under similar circumstances, except that the last statement which was accepted by the jury was made under circumstances tending to throw doubt and suspicion thereon. Who among us is gifted with such subtle discernment as to be able to say that the last statement rather than the first comports with the true version of the occurrence!

These two conflicting statements should be clearly placed in juxtaposition before the minds of a jury, and their attention should pointedly be called to their apparent irreconcilability and to the circumstances under which they were respectively given and in such a manner that the question thus presented is not minimized or obscured by other questions in the case, so that the verdict of the jury if in plaintiff's favor may clearly and beyond peradventure carry with it the expression of their belief that the latest statement of the plaintiff is the true one, notwithstanding the apparent probabilities to the contrary. The defendant's motion for a new trial should have been granted.

The judgment and order must be reversed and a new trial granted, with costs to the appellant to abide the event.

KELLOGG and SEWELL, JJ., concurred; SMITH, P. J., concurred in result; CHESTER, J., dissented.

Judgment and order reversed and new trial granted, with costs to appellant to abide event:



LIZZIE TURNBULL and SPENCER BILLINGTON, as Administrators, etc.,  
of PETER TURNBULL, Deceased, Appellants, v. GEORGE H.  
TURNBULL, Respondent.

Third Department, March 18, 1907.

**Gift—deposit of money payable to depositor or his brother—when no  
gift or trust created.**

When one deposits money in a bank and accepts certificates of deposit payable to his own order or that of his brother, with the express intention that he shall use the money during his lifetime and that what he leaves at his death shall go to his brother, and the certificates remain in the possession of the depositor to the time of his death, there is no gift or trust in favor of the brother, but merely an attempt to do that in the future which can only be done by will.

APPEAL by the plaintiffs, Lizzie Turnbull and another, as administrators, etc., from a judgment of the County Court of Montgomery county, entered in the office of the clerk of said county on the 14th day of February, 1906, upon the decision of the court, rendered after a trial before the court without a jury, dismissing the plaintiffs' complaint.

*H. V. Borst* and *Charles E. Hardies*, for the appellants.

*R. B. Fish* and *Louis S. Carpenter*, for the respondent.

COCHRANE, J. :

On March 24, 1903, Peter B. Turnbull, the plaintiffs' intestate, received from the Fultonville National Bank a certificate of deposit, of which the following is a copy :

"THE FULTONVILLE NATIONAL BANK.

"No. 10387. \$100.

"FULTONVILLE, N. Y., Mar. 24, 1903.

"This certifies that P. B. Turnbull has deposited in this bank One Hundred Dollars payable to the order of himself or Geo. H. Turnbull on the return of this certificate properly endorsed.

"O. F. CONABLE, *Cashier*."

On June 13, 1903, the said deceased received from said bank another certificate of deposit for the sum of fifty dollars and on

January 15, 1904, another certificate for the sum of thirty dollars, such certificates being the same in form as that above set forth. These certificates remained in the possession of said Peter B. Turnbull until his death, which occurred January 19, 1904, four days after the date of the last certificate. Thereafter the defendant having taken possession of the certificates received payment therefor on presentation to the bank. Plaintiffs having demanded of the defendant that said certificates be returned bring this action for the conversion thereof.

Deceased and the defendant were brothers. The deceased began making deposits in the bank several years before his death when he was residing with the defendant. The cashier of the bank testified that when the first deposit was made the deceased stated that he wanted it arranged so that he could use the money in his lifetime and what he should have left when he died he wanted his brother George to have. At the suggestion of the cashier a certificate was issued to the deceased in the form above indicated to carry out the declared purpose of the deceased as thus expressed. Thereafter from time to time the deceased made additional deposits and withdrew some of the money deposited and received from the bank new certificates all in the form indicated until his transactions with the bank resulted in the three certificates of deposit which are the subject of this controversy.

The learned county judge has found as a fact on sufficient evidence "that said certificates were and each of them was made payable as aforesaid by the request and direction of said deceased with the intent that in case said certificates were outstanding at the time of his death and the defendant survived him, said certificates and the proceeds thereof should belong to the defendant and with the intent to give said certificates to the defendant in case he survived the deceased and for the purpose of effectuating such intent and for no other purpose."

In *Sullivan v. Sullivan* (161 N. Y. 554) facts were proved very similar to the facts here established. In that case a certificate of deposit was received payable to the order of the depositor "or in the case of her death to her niece Catherine Sullivan." The court said: "There was no intention either expressed in terms or to be implied from the nature of the transaction to immediately transfer

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the title of the fund to the defendant or to the bank except as the depository and debtor of the depositor. This is the essential difference between the position of the defendant and the *cestuis que trust* in the cases cited in support of her contention. As was said by Chief Judge CHURCH in *Martin v. Funk* (75 N. Y. 138): 'Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should be informed of the trust.' Reduced to its simplest analysis, the transaction between the plaintiff's intestate and the bank established between them only the relation of debtor and creditor, which could not be and was not changed by the intention of the former to provide, in the event of her death, for the defendant. The defendant acquired no rights *in præsenti*; she was to acquire them *in futuro*. This is the test which marks the essential difference between a valid gift *inter vivos* or an effectual parol trust, and the mere expressed desire or intention to do that in the future which can only be done by will."

When that case was before this court (39 App. Div. 99) there was an intimation that "if the certificate had provided that the sum deposited should be payable to deceased or the defendant," there might have been a valid trust, on the theory that the contract between the depositor and the bank, when the fund was deposited, would have indicated that an interest in such fund was *at once* created in favor of the donee. The case of *McElroy v. National Savings Bank* (8 App. Div. 192) was cited in support of that proposition.

If in the present case it appeared that it had been the purpose of the deceased when he made the deposits to vest in the defendant an *immediate* interest therein, perhaps we should hold, as intimated by this court in the *Sullivan* case, that a valid trust had been created for the benefit of the defendant. But such theory is opposed to the facts as found by the learned county judge. It is also contrary to the declared purpose of the deceased to the cashier of the bank when the first deposit was made that "he wanted it so that he could use it in his lifetime, and what he should have left when he died he wanted his brother George to have." And the trial court has found that the certificates were issued in the form in which they appear

“with the intent to give said certificates to the defendant *in case he survived the deceased*, and for the purpose of effectuating such intent and for no other purpose.” The facts, as proved and found by the trial court, bring the case squarely within the *Sullivan* case, and supply the difference in the form of the certificates in this case and the form of the certificate in that case. It is clear that whatever interest the defendant was to have in the deposits was to be postponed until the death of the depositor and was then to relate to only so much of the fund as might then remain. There was no gift or trust, but merely an attempt to do that in the future which can only be done by will.

The judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

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GEORGE FISHER, Respondent, v. ALLEN C. MEEKER, Appellant.

Third Department, March 13, 1907.

**Principal and agent—when overpayment to principal not recoverable from agent.**

An agent acting within the scope of his authority cannot be held liable by persons other than his principal for moneys properly received by him in the name and in the business of the principal.

Thus, where the plaintiff purchased goods of the defendant as agent to whom he paid the purchase price without any express promise by the agent to pay the sum to the principal, and thereafter on demand by the principal again paid a portion of the purchase money, he cannot recover the overpayment from the agent. This, because payment to an agent who has authority to collect is payment to the principal and an absolute discharge of the debt, and it is of no consequence to the debtor that the agent fails to account to the principal.

CHESTER, J., dissented.

APPEAL by the defendant, Allen C. Meeker, from a judgment of the County Court of St. Lawrence county, entered in the office of the clerk of said county on the 2d day of May, 1906, upon an order

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of said County Court entered on the 2d day of May, 1906, affirming a judgment of the Justice's Court of the town of Waddington in favor of the plaintiff, and also from the said order upon which the judgment appealed from was entered.

*Frederic J. Merriman*, for the appellant.

*Edward P. Martin*, for the respondent.

SEWELL, J. :

The plaintiff purchased a cultivator of the defendant, who was selling carriages and farm implements for one Horton. The price of the cultivator was thirty dollars, of which ten dollars was paid at the time of purchase. The plaintiff claims that he subsequently paid the balance to the defendant and then said to him : " Have come to pay balance on cultivator ; " that he gave him twenty dollars and told him to apply same on balance for cultivator bought of Horton, and that Meeker said he was going to the office and would give him credit on his books.

Sometime thereafter Horton notified the plaintiff that a balance of twenty dollars was due, and threatened to commence a proceeding to collect the same, whereupon plaintiff paid Horton the amount claimed and brought this action against the defendant to recover the twenty dollars paid to him.

As to the relations existing between the defendant and Horton there can be no doubt. It is undisputed that he was doing business for Horton and in his name. The plaintiff testified that he understood that Horton owned the goods in the store and that the defendant was working for him, and " I understood the same when I paid him the ten dollars and the same when I paid him the twenty dollars."

There is no evidence in the case tending to establish the fact of agency for the plaintiff in this particular transaction. No evidence was offered showing or tending to show that the defendant bound himself by an express promise to the plaintiff to pay the money to Horton, or that he assumed any duty in his individual character or which did not devolve upon him purely from his employment by Horton. Hence, the question is presented whether an agent, acting

within the scope of his authority, can be held liable by any other person than his principal for money properly received by him in the name and business of the principal.

The case of *Smith v. President, &c., of Essex County Bank* (22 Barb. 627) is a direct authority against the right to sustain such an action. It was there held that a payment to an agent who has authority to collect is a payment to the principal and an absolute discharge of the debt, and that it is a matter of no sort of consequence, so far as the debtor is concerned, whether the agent accounts for it or misapplies it.

In the case of *Hall v. Lauderdale* (46 N. Y. 70) it was held that an action cannot be maintained against an agent, although, having money of his principal in his hands, applicable to the payment of the debt of his principal, he refuses to pay it. The court, through Judge ANDREWS, said: "The defendant was responsible to the principal, and to the principal alone, for any omission or neglect of duty in the matter of his agency."

The case of *Colvin v. Holbrook* (2 N. Y. 126) recognizes this same principle. The court there said: "The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself, and the individuality of the agent so far is merged in that of the principal. It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible." (*Cooper v. Tim*, 16 Misc. Rep. 372.)

There is a class of cases to which the respondent refers in which the responsibility of agents and servants has been upheld. They are cases where the principal had no right to receive the money, and, of course, could confer none upon the agent, or where it was paid by mistake, or where the agent exceeded his authority, or was guilty of misfeasance, not as an agent or servant but as a wrongdoer, or where payment was induced by a wrongful act of the agent, or there was an explicit agreement to return it.

These cases differ from a case like this, where the agent had a

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right to receive the money for his principal and receives it, not in his individual capacity, but as the agent of the creditor and for his use.

No case has been cited, and I think none can be found, where an agent or servant has been held under such circumstances.

The County Court was, therefore, wrong in affirming the judgment of the justice. It should be reversed, as well as the judgment in Justice's Court, with costs in this court and in the County Court.

All concurred, except CHESTER, J., dissenting.

Judgment of the County Court and Justice's Court reversed, with costs in this court and in the County Court.

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EDWIN GARRISON, Appellant, v. LESTER HUTTON and ROBERT K. HUTTON, Respondents.

Third Department, March 13, 1907.

**Landlord and tenant—breach of covenant for quiet enjoyment—when landlord liable.**

In an action by a tenant against his landlord for the breach of a covenant for quiet enjoyment it appeared that the keys of the building were by consent left with third persons for delivery to the plaintiff, but he could not obtain the keys. It appeared moreover that the landlord refused possession unless the tenant agreed to pay half of the expense of repairing frozen water pipes.

*Held*, that a reversal of judgment for damages for breach of covenant was not warranted.

APPEAL by the plaintiff, Edwin Garrison, from an order of the County Court of Ulster county, entered in the office of the clerk of said county on the 7th day of March, 1906, reversing a judgment of the City Court of the city of Kingston in favor of the plaintiff and granting a new trial.

*N. Frank O'Reilly* and *John D. Eckert*, for the appellant.

*Charles W. Walton*, for the respondents.

SEWELL, J. :

The unchallenged facts are that the defendants leased to the plaintiff the first and second floors of their building for five months from December 1, 1904, at a monthly rental of seventy dollars, payable in advance ; that the first month's rent was paid ; that the lease was under seal, and embraced in it was a covenant that the plaintiff "shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid." It appears that it was understood and agreed that the keys would be left next door with some Italians, and would be there when the plaintiff wanted them ; that the plaintiff made repeated efforts to obtain the keys, but was unable to do so or gain possession of the premises.

It appears by the evidence of the plaintiff that on the twenty-fifth day of December one of the defendants said to him that the plumbing was frozen up and the expense would be \$150, and that "We cannot afford to let you go in there unless you pay half the expenses of this plumbing," and that the defendants refused to let him in unless he paid one half of the plumbing bill. The testimony of the plaintiff as to the efforts made to obtain possession was corroborated by the evidence of other witnesses, and we are unable to agree with the learned county judge in the statement that it was vague, unsatisfactory and contradictory. There was a conflict of evidence upon this question and as to whether the defendants refused to permit the plaintiff to occupy the premises, but we think the evidence was at least as strong and convincing in behalf of the plaintiff as of the contesting defendants. However that may be, there was not such a strong preponderance of proof in favor of the defendants as to warrant a reversal as against the weight of evidence under the rule laid down in *Murtagh v. Dempsey* (85 App. Div. 204).

It is true that a covenant for quiet enjoyment imports no warranty, express or implied, as respects the acts of strangers (*Gardner v. Keteltas*, 3 Hill, 330), but it is well settled that if the lessor himself denies the lessee's right and refuses to permit him to occupy the premises, or if he is directly connected with the withholding of the property, the lessee may bring his action for the damages sustained. (*Trull v. Granger*, 8 N. Y. 115.)



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The order of the County Court should be reversed and the judgment of the City Court affirmed, with costs in this court and in the County Court.

All concurred.

Order of the County Court reversed and the judgment of the Justice's Court affirmed, with costs in this court and in the County Court.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRED DAUCHY  
Appellant, v. SEBASTIAN W. PITTS, as Sheriff of the County of  
Albany, New York, and Custodian of the Albany County  
Penitentiary, Respondent.

Third Department, March 13, 1907.

**Crime — habeas corpus — when warrant of commitment sufficient.**

The warrant of commitment of one convicted of crime, except in capital cases, need not be signed by the judge or justice who pronounced judgment or by a clerk of the court. Under section 486 of the Code of Criminal Procedure a certified copy of the judgment as entered on the minutes is sufficient warrant for the execution of judgment.

APPEAL by the relator, Fred Dauchy, from an order made by the recorder of the city of Albany and entered in the office of the clerk of the county of Albany on the 8th day of January, 1907, dismissing a writ of habeas corpus and remanding the relator to the custody of the respondent.

*James J. Byard, Jr.*, for the appellant.

*George Addington, Robert H. McCormic and Ulyses G. Welch*,  
for the respondent.

SEWELL, J. :

The relator sued out a writ of habeas corpus, claiming to be illegally deprived of his liberty by the custodian of the Albany County Penitentiary.

It appears that he was held under a judgment of the Otsego

County Court, which recites that the defendant was duly indicted for the crime of assault in the second degree; that he was duly arraigned and plead not guilty; that he was duly tried by the court and a jury, and convicted upon such trial of the crime of assault in the third degree; that the district attorney moved for judgment; that the defendant waived his right to delay, and requested to be sentenced at once, and thereupon the said Fred L. Dauchy was "by the law and the court, on this 7th day of August, sentenced to be confined in the Albany County Penitentiary for the term of nine months."

The recorder, after hearing the relator, declined to discharge him, and remanded him to the custody of the custodian of the Albany County Penitentiary, to be confined therein in accordance with the terms of his sentence, and dismissed the writ.

The relator claims that he is not detained by virtue of a proper warrant of commitment, in that the paper purporting to be a copy of the record of the Otsego County Court is unsigned, and does not conform to the requirements of sections 486 and 487 of the Code of Criminal Procedure.

There is no provision requiring a warrant of commitment to be signed by the judge or justice pronouncing judgment, or by a clerk of the court, on the trial of such an indictment. Section 486 of the Code of Criminal Procedure provides that the authority for the execution of a judgment, except of death, is a certified copy of the entry thereof upon the minutes; that it must be furnished to the officer whose duty it is to execute the judgment, and that no other warrant or authority is necessary to justify or require its execution.

Section 489 provides that "if the judgment be imprisonment, except in a county jail, the sheriff must deliver a copy of the entry of the judgment upon the minutes of the court, together with the body of the defendant, to the keeper of the prison in which the defendant is to be imprisoned." The judgment referred to in those sections is the sentence of the court, and a certified copy of it as entered on the minutes is all that is required.

As was said in *People ex rel. Trainor v. Baker* (89 N. Y. 460): "The relator was not detained or required to be detained by virtue of any warrant. He was detained by virtue of the judgment of the court, and that judgment was a sufficient authority for his

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detention. The warrant of commitment is simply an authority and direction to the sheriff or other officer to convey the prisoner to the penitentiary. That needs not necessarily to be left with the keeper. If he has no other evidence of his authority to detain the prisoner, he should have that. But if the officer who brings a prisoner to the penitentiary furnished the keeper with a certified copy of the judgment of the court, then that is sufficient evidence of the keeper's authority, and he needs to have no other." (*People v. Bradner*, 107 N. Y. 4.)

I think the order of the recorder should be affirmed.

All concurred.

Order affirmed.

THOMAS C. ROWE, Appellant, v. WILLIAM E. GRANGER and Others,  
Respondents.

Third Department, March 13, 1907.

**Vendor and purchaser — when bidder on execution sale who fails to complete purchase not entitled to property sold — when purchaser loses title by judgment against sheriff in another action — costs — when separate bills allowable.**

A bidder at the sale of property on execution is not vested with title by the mere act of bidding the property off, and if payment is postponed until the following day and in the meantime the property is taken from the sheriff by requisition in another action, the bidder is not entitled to the premises.

A sheriff must sell for cash and to consummate a sale there must be a bidder, the property must be struck off and the bidder must complete his purchase by complying with the terms of sale.

When a sheriff accepts a bid on sale on execution, but postpones payment until the following day and the property is taken from the sheriff under requisition in another action in which the plaintiff succeeds, the judgment in that action is binding on the prior bidder even though the sheriff by postponing the time of payment be considered to have become the bailee of the purchaser.

In an action at law defendants who separately appear and answer may tax separate bills of costs unless it be shown that they are united in interest or collusively appear by separate attorneys in bad faith for the purpose of enhancing the costs.

Extra allowance affirmed.

APPEAL by the plaintiff, Thomas C. Rowe, from a judgment of the Supreme Court in favor of the defendants, entered in the office

of the clerk of the county of Albany on the 22d day of September, 1906, upon the decision of the court, rendered after a trial at the Albany Trial Term without a jury, dismissing the plaintiff's complaint, and also from an order entered in said clerk's office on the 13th day of November, 1906, denying the plaintiff's motion for a retaxation of costs.

*Andrew J. Nellis and David H. Stanwix*, for the appellant.

*John Cadman and E. F. McCormick*, for the respondents.

SEWELL, J.:

The principal question in this case is whether the sale by the sheriff of the property in question was completed.

The property was duly exposed for sale October 6, 1904, under executions issued against the property of the Yuengling Hudson New York Breweries, and was bid off by the appellant for about \$1,600. On the day of sale the appellant offered to pay the amount of his bid, and the sheriff said, "Let it go until to-morrow morning, then you can pay for it and take it away." The next morning, before the appellant offered to pay the amount bid, the property was taken from the possession of the sheriff by the coroner under a requisition issued in an action in which the defendants herein were plaintiffs and the sheriff was defendant.

The action was brought to trial and a judgment was entered in favor of the defendant therein, which awarded him the possession of the property or \$2,000, "in case the possession thereof is not delivered to the defendant."

April 27, 1905, the plaintiffs in that action paid to the sheriff the amount directed to be paid, in lieu of the delivery of the property, and retained possession. On the same day the plaintiff herein tendered to the sheriff the amount bid by him at the sale, less fifty dollars paid October 8, 1904, which the sheriff refused to receive.

The appellant contends that there was a valid sale of the property in question, and that it was complete when it was struck off to him.

We are of the opinion that this claim is not well founded. It is not enough that property is bid off at a sale on execution. The legal title is not divested or transferred, nor is the execution satisfied by

the single act of bidding it off. In such a sale, as in all sales at public auction, three things are necessary to consummate it. There must be a bidder; the property must be "struck off" or "knocked down," and the bidder must complete his purchase by complying with the terms of the sale.

It is too well settled in this State to be questioned that a sheriff must sell for cash; that payment of the amount bid is one of the conditions of the sale imposed by law, and that if a bidder to whom property is struck off refuses or omits to make payment the sheriff must avoid the sale and resell it.

This rule is intended to protect the defendant in the execution as well as the judgment creditor, by securing to the former the continuing right of ownership until the amount bid for the property is actually paid.

Applying this rule to the present case, it is seen that the appellant did not obtain title to the property in question but only a right to acquire it by paying the purchase money and perfecting the sale, which it is admitted he did not do.

This doctrine was held and expressed in the case of *Holmes v. Richmond* (19 Hun, 634). In that case the sheriff offered the property for sale on an execution, and it was struck off to Swinburne & Co., who said they were not ready to pay then, but would pay the bid in the morning when the banks were open, and the sheriff assented to giving them the time until the next morning at ten o'clock. The next morning before Swinburne & Co. appeared to pay their bid, one of the defendants in the executions appeared at the sheriff's office and paid the amount of the execution to the sheriff; afterwards Swinburne & Co. appeared and offered to pay their bid, but the sheriff refused to receive it. The court, at General Term, said: "We think the nonsuit was entirely correct. The first sale was not completed, but the sheriff gave the bidder time to pay the money bid, which he had no authority for doing. He could not make a valid sale except for cash, and the sale was not complete until the payment of the money bid."

It is not necessary, however, in order to support the judgment, to maintain that the appellant did not acquire a good title to the property. If it be assumed that the title to the property passed to him when it was struck off at the sale, that there was a construc-

tive delivery to the sheriff, and the property was left with him to be delivered upon a subsequent occasion, it follows that the sheriff was a bailee; that he represented the appellant in the former action and held the amount paid in satisfaction of the judgment recovered therein in trust for him.

Under such circumstances there can be no doubt that the judgment bars this action as effectively as though the former action had been brought directly against the plaintiff herein. As was said by the court in *Baird v. Daly* (57 N. Y. 245): "A recovery, either by the bailor or the bailee, is a bar to an action by the other party. (*Green v. Clarke*, 12 N. Y. 343.)"

The appeal from the order denying the motion for a retaxation of costs presents the question whether the defendants, who separately appeared and answered, were properly permitted to tax separate bills of costs. The rule, in an action at law, is that defendants appearing and answering by separate attorneys are entitled to separate bills of costs, and that this right can only be defeated by showing that the parties are united in interest or collusively appeared by separate attorneys in bad faith for the purpose of enhancing the costs. (*Williams v. Cassady*, 22 Hun, 182.)

No fact is stated in the affidavits submitted which justify the conclusion that the separate appearances were collusive or for the purpose of enabling the defendants to tax more than one bill of costs. They were not partners and were under no obligations either in law or fair dealing to unite in their defense, and, therefore, are entitled to separate bills.

Whether this action should be regarded as difficult and extraordinary, within the meaning of section 3253 of the Code, was a question addressed to the discretion of the trial court, and as was said in *Bryon v. Durrie* (6 Abb. N. C. 140): "The determination of the question usually involves so many considerations which are addressed to the discretion of the judge, that the appellate court rarely interferes."

We think there was no abuse of discretion in the present case, and that the order denying retaxation, as well as the judgment herein, should be affirmed, with costs.

Judgment and orders unanimously affirmed, with costs.

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JAMES H. AKEN, Appellant, v. BARNET AND AUFSSESSER KNITTING  
COMPANY, Respondent.

Third Department, March 28, 1907.

**Negligence — Employers' Liability Act — injury on elevator.**

The superintendent of a mill, although the *alter ego* of the owner, is entitled to the benefits of the Employers' Liability Act, which makes no distinction between different classes of employees.

Although the master has posted a notice forbidding employees from riding on a freight elevator, it is for the jury to say whether the defendant acquiesces in such use when there is evidence that the employees were accustomed to use it to the knowledge of the master, and a dismissal of the complaint of a superintendent who was injured on such elevator, is error.

As section 8 of the Employers' Liability Act provides that the question whether an employee assumes the risk of injury or is guilty of contributory negligence by the continuance in his employment with knowledge of the risk is a question of fact, it is error to dismiss the complaint of one injured on the freight elevator upon the ground that being near a landing when the elevator stopped, he could have stepped to the floor and attempted to operate it from a place of safety.

SMITH, P. J. and SEWELL, J., dissented.

APPEAL by the plaintiff, James H. Aken, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Albany on the 21st day of May, 1906, upon the dismissal of the complaint by direction of the court after a trial at the Albany Trial Term.

*Daniel C. McElwain* and *James H. Berns*, for the appellant.

*J. Murray Downs*, for the respondent.

CHESTER, J. :

The action is for negligence, and the complaint makes the necessary allegations to bring it under the Employers' Liability Act (Laws of 1902, chap. 600). The plaintiff was employed by the defendant as superintendent of its knitting mill. The respondent urges that because the plaintiff was the defendant's superintendent he was the *alter ego* of the master and, therefore, the Employers' Liability Act does not apply. The fact that the plaintiff was a superintendent of the defendant makes him none the less an employee and that act does not assume to make any distinction between dif-

ferent classes or kinds of employees, but is for the benefit of all employees of whatever grade.

The plaintiff claims he was injured while riding upon an elevator in going from the second to the fourth floor of the mill, by having his right foot caught between the edge of the elevator and the floor of the fourth story. He claims that when the elevator got near the fourth floor it stopped about ten or twelve inches below the floor and remained there stationary about a minute; that it would not move one way or the other; that he took hold of the shifting rod and tried to move it up even with the floor and it would not work; that after he had tried to move the elevator up and down he was going to step off, and as he did so it started up and he was thrown forward and his foot caught between the floor and the elevator and he suffered the loss of the great toe of his right foot and other injuries to his foot and ankle. The elevator was an ordinary freight elevator and was operated by means of what is called a shifting rod attached to one of the side beams, so that it could be operated by any one at any of the floors. It could not be operated from the elevator until it approached the floor going up or coming down, and one had to be on or near the floor before he could get hold of this rod in order to stop or start the elevator. The friction gear of the elevator was operated by a belt and the claim of plaintiff is that this belt was "slippery, slack and rotten," and that the defendant had been notified of its defective condition and promised to remedy it, but had not done so. There was enough evidence on this branch of the case to make the question of the defendant's negligence one for the jury.

It was shown by the defendant that there was posted in the mill on the elevator on every floor a notice, of which the following is a copy:

"CAUTION.

"Employees are forbidden from riding on this elevator.

"Anyone riding on same does so at their own peril. This elevator is for freight only.

"COMMERCIAL KNITTING MILL CO."

The name signed thereto was that of the prior occupant of the mill. The plaintiff denied, in his evidence, that the caution sign or notice was posted on the elevator during the time he was employed in the mill, and denied knowledge of such notice. But whether the notice was posted or not, as claimed by the defendant,



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there was much evidence that the defendant acquiesced in and, upon occasion, directed the use of the elevator by its employees in going from floor to floor, and that the employees very generally used it for their convenience when not engaged in carrying freight, and that it was so used with the knowledge of the officers of the defendant. This was denied by the defendant, and there was thus raised a clear question of fact for the determination of the jury.

It is also urged on the part of respondent that the complaint was properly dismissed, for the reason that after the elevator came to a stop when within about a foot of the floor to which the plaintiff was going, he could have stepped from the platform of the elevator to the floor and been in a place of absolute safety, and that he could then have manipulated the shifting rod from that place with safety, and because he chose to stand upon the elevator while doing this he voluntarily assumed the risks incident thereto. There would be great force in this contention were it not for the Employers' Liability Act, which provides in section 3 that "the question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence." We think, therefore, it could not be said as a matter of law that the plaintiff assumed the risk, nor that he was guilty of contributory negligence as a matter of law.

Construing, as we must on this appeal, all disputed facts as established in favor of the plaintiff, and drawing the most favorable inferences deducible from the evidence, as we are required to do, we think the case should have been submitted to the jury in the first instance, and its verdict taken subject to the right of the court to set it aside if it should be deemed to be against the evidence or the preponderance thereof.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except SMITH, P. J., and SEWELL, J., dissenting.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

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JOHN McVEY, Appellant, v. SECURITY MUTUAL LIFE INSURANCE  
COMPANY, Respondent.

Third Department, March 28, 1907.

**Practice — pleading — amending prayer for relief — when service of formal amended complaint not necessary.**

Although the prayer for relief is not a part of the cause of action it is part of the complaint, and a motion to amend the prayer is a motion to amend the complaint.

But upon such amendment not affecting the facts alleged, where it is merely sought to ask equitable relief instead of money damages, a plaintiff is not required to serve a copy of the proposed amended complaint with the motion papers; especially so, when the proposed prayer for relief is set out in the moving papers.

APPEAL by the plaintiff, John McVey, from an order of the Supreme Court, made at the Broome Special Term and entered in the office of the clerk of the county of Broome on the 19th day of February, 1907.

*S. Mack Smith*, for the appellant.

*Hinman, Howard & Kattell* and *Frederic William Jenkins*, for the respondent.

CHESTER, J. :

The order appealed from denies the plaintiff's motion to correct the prayer for relief in his complaint and to have the cause transferred from the trial jury to the equity calendar of the court, on a preliminary objection that no proposed amended complaint was served.

The prayer for relief was for a money judgment only. At the time of the commencement of the action it had been decided by this court in a similar action against this defendant that upon the facts alleged and proved the plaintiff was entitled to a money judgment. (*Kelly v. Security Mutual Life Ins. Co.*, 106 App. Div. 352.) Upon an appeal to the Court of Appeals it was held that upon such facts the plaintiff was entitled, if anything, to a judgment in equity only. (186 N. Y. 16.)

The appellant contends that a motion to correct the prayer for relief is not a motion to amend the complaint, and cites authorities holding that the prayer for relief forms no part of the cause of

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action. But under subdivision 3 of section 481 of the Code of Civil Procedure it is provided that the complaint must contain "a demand of the judgment to which the plaintiff supposes himself entitled." So that while the prayer for relief is no part of the cause of action it is a part of the complaint.

This motion was, therefore, one to amend the complaint. Notwithstanding this we do not agree with the respondent's counsel that under the authorities, as applied to the facts here, the plaintiff was required to serve a copy of the proposed amended complaint with his motion papers. When a party seeks to amend his cause of action that is a salutary rule which should be adhered to, but here the plaintiff expressly disclaims any intention or desire to amend his cause of action. The reason of the rule is that the court and the opposing party may be advised of the exact form and language of the proposed pleading as amended. The defendant has a statement of all the facts constituting the cause of action in the complaint already served and to which it has interposed its answer. The plaintiff is not seeking in any way to change this cause or the facts constituting it. With his motion papers and in his notice of motion he states fully the exact language of the prayer for equitable relief which he desires to have inserted in the complaint in the place of the prayer for a money judgment which he asks to have stricken out. The defendant, therefore, is just as fully advised of the exact terms of the entire proposed amended complaint as if one had been served with the notice of motion. The reason for the application of the rule not existing here, we think it should not have been applied, and as the only purpose of the amendment appears to have been to get the case on the equity calendar for trial and to remove it from the law calendar, we think it should have been allowed.

The order appealed from should be reversed, with ten dollars costs and printing disbursements to the appellant, and the motion granted on payment by defendant of ten dollars costs of motion, with leave to the defendant, in view of the demand for equitable instead of legal relief, to serve an amended answer, if it should be advised to that effect.

All concurred.

Order appealed from reversed, with ten dollars costs and disbursements to the appellant, and motion granted on payment by plaintiff of ten dollars costs of motion, with leave to defendant, in view of the demand for equitable instead of legal relief, to serve an amended answer if it should be advised to that effect.

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ROBERT M. S. PUTNAM, Respondent, Appellant, v. LINCOLN SAFE DEPOSIT COMPANY, Respondent, Impleaded with HARRY P. PENDRICK, as Administrator with the Will Annexed of MARY S. PUTNAM, Deceased, and Others, Appellants, Respondents, and CORLISS SHELDON, as Administrator with the Will Annexed of JOHN R. PUTNAM, Deceased, Appellant.

Third Department, March 28, 1907.

**Trust—liability of representative of deceased life beneficiary for trust moneys misappropriated—when Statute of Limitations not available.**

Action to determine the right of remaindermen in certain trust property alleged to have been misappropriated by the trustee and life tenant. It was established by a prior decision that under the testator's will a trust was created for the benefit of the testator's daughter for life with remainders over to her three children. During the administration of the trust the trustee turned over large portions of the estate to the life beneficiary who had dealt with it as her own as if not impressed with a trust. An accounting by representatives of the deceased trustee and life beneficiary being sought in the present action,

*Held*, that the Statute of Limitations did not begin to run in favor of the life tenant and as against the remaindermen until the death of the life tenant;

That as the life tenant received the property with knowledge of the trust and that it would go to the remaindermen at her death, she held as trustee *de son tort* and was not entitled to the benefit of the Statute of Limitations during her life;

That shares of stock in mining corporations of foreign States were not to be treated as real estate as to which the testator died intestate by reason of not having three witnesses to his will as required in said States, in the absence of proof that such property was real property by the foreign laws. Hence, such stock received by the trustee from the testator should be accounted for as part of the estate in which the remaindermen should share;

That the judgment of a foreign court in an action to compel the transfer of a legal title to said mining stocks was not binding upon remaindermen not made parties to the action;

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That stock purchased with the proceeds of stock formerly owned by the testator was part of the trust estate, and a finding to that effect should be made when it appeared that the life beneficiary, having received insurance moneys from a loss by fire, purchased the stock with the insurance moneys but made good the loss upon her property by moneys drawn from the trust funds;

That a court of equity will preserve a trust estate intact, and where the trustee and life beneficiary having knowledge of the trust have commingled the trust moneys with their own and no rights of creditors or equities of innocent third persons have intervened, the burden is upon the representatives of the trustee and life beneficiary to show clearly that securities as to which the title is in issue were not purchased with the trust funds;

That the remaindermen were entitled to recover the amount of trust moneys applied for the improvement of the lands of the life beneficiary;

That the remaindermen were entitled to recover on a note given by the life beneficiary to the trustee in settlement of a shortage in the trust estate by reason of moneys received to her own use;

That when the representative of a deceased beneficiary has been charged with the value of securities bought with the proceeds of securities sold, he should not be also held liable for the latter.

COCHRANE, J., dissented in part, with memorandum.

APPEAL by the defendant Corliss Sheldon, as administrator, etc., from a judgment of the Supreme Court, entered in the office of the clerk of the county of Saratoga on the 30th day of March, 1906, upon the decision of the court rendered after a trial at the Saratoga Special Term.

Also separate appeals by the defendants Harry P. Pendrick, as administrator, etc., and others, and by the plaintiff, Robert M. S. Putnam, from certain portions of said judgment.

The action was commenced to have a substituted trustee appointed in the place of the late Judge John R. Putnam, who it is claimed, was a trustee under the will of Robert M. Shoemaker, to execute such trust; and to have determined the rights and interests of the plaintiff and his two brothers and their mother in the trust property, which was largely kept in a box in the office of the defendant, the Lincoln Safe Deposit Company.

The plaintiff Robert M. S. Putnam and the defendants John Risley Putnam and Israel Putnam are children of said John R. Putnam, deceased, and his wife, Mary S. Putnam, and her only children and heirs at law, and she was a daughter of said Robert M. Shoemaker, late of Cincinnati, O., deceased. The action was commenced after the death of said John R. Putnam and before the death of his

wife. It was claimed that under the will of said Robert M. Shoemaker he gave certain of his property in trust to said John R. Putnam for the benefit of his wife with remainder to her children.

Soon after the commencement of the action said Mary S. Putnam died and Charles H. Sturges was appointed temporary administrator of her estate. He afterwards died and the defendant Harry P. Pendrick was appointed her administrator with the will annexed. The answer of the defendant John Risley Putnam practically admitted the allegations of the complaint and joined in the prayer for relief therein contained. The representatives of the estate of John R. Putnam and Mary S. Putnam separately answered, denying substantially all the allegations of the complaint.

The action came on for trial at the Special Term and resulted in an interlocutory judgment holding that under the will of Robert M. Shoemaker, John R. Putnam, the father, took title to one-fifth of the residuary estate thereunder as trustee for the benefit of Mary S. Putnam as life tenant and her three children, and upon her death the remainder passed to her three children in equal shares by virtue of the will. The interlocutory judgment decreed an accounting of the trust estate and directed a reference to report concerning the same and the situation of the trust property and its equitable division. (See *Putnam v. Lincoln Safe Deposit Co.*, 34 Misc. Rep. 333.)

On appeal to this court such interlocutory judgment was affirmed. (66 App. Div. 136.) Reference to the report of that decision may be had for the material provisions of the will in question. In accordance with the requirements of the interlocutory judgment the matter went to a referee to take and state the account of the trust estate. On the coming in of his report it was confirmed by the Special Term and final judgment thereon directed. On the hearing before the referee a statement or inventory made by Judge Putnam in 1899 just before leaving on a journey with his wife to the Philippine Islands during which he died and which was found in his safe after his death, showing as is claimed the amount of the corpus of the trust estate, of what it consisted, where such estate was kept, what amount thereof had been disposed of and what amount had been purchased to take the place of that disposed of, known as Exhibit 27, and also a note signed by Mrs. Putnam for

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\$36,987 given by her to him as trustee, which balanced the account as made by him, were received in evidence, and it was held at the Special Term that said Exhibit 27 was competent evidence against her estate as well as his. On appeal to this court it was held by a divided court that such Exhibit 27 was improperly received in evidence as against her estate and the judgment was for that reason reversed and a new trial ordered. (87 App. Div. 13.) A new trial has now been had before the court at Special Term. (49 Misc. Rep. 578.)

The trial court found, among other things, "that in the years 1887 and 1888 there was delivered to John R. Putnam as trustee under the will of Robert M. Shoemaker by the executors of Robert M. Shoemaker, deceased, securities and cash of the par value and amount of \$176,490.75." This amount does not include 115 shares of Sibley Manufacturing Company's stock of the par value of \$11,500; 20 shares of the Langley Manufacturing Company's stock of the par value of \$2,000; nor 40 shares of the Augusta Factory stock of the par value of \$4,000 which belonged to Robert M. Shoemaker and which it is claimed formed a part of the trust estate. The court also found that \$104,600 of the said amount of \$176,490.75 were issued to and in the name of Mary S. Putnam by the respective corporations issuing the same and that with the knowledge on her part of the trust provisions of her father's will this \$104,600 in amount of securities were transferred to her by her father's executors previous to said delivery thereof to John R. Putnam as trustee; that upon the death of John R. Putnam there was missing of said securities and cash the sum of \$100,290.75, and that after deducting such missing cash and securities there remained on hand \$76,200; that of this last-named amount \$32,300 thereof stood in the name of John R. Putnam as trustee, or were payable to bearer, and \$42,900 of said securities on hand stood in the name of Mary S. Putnam, and that of the total amount of \$104,600 of securities issued in Mary S. Putnam's name, \$61,700 were missing and were sold by her, and for which she realized the sum of \$68,410.

There is also a finding "that Mary S. Putnam knew that the will of her father, R. M. Shoemaker, created a trust, and was a party to a decree of the Ohio courts rendered in the year 1887, which so

adjudicated. She received the said securities payable to and sold by her as aforesaid and the proceeds thereof for the purposes of said trust to carry out the trust provisions of said will, and constituted herself, by her intermeddling with and assumption of the management of said property and proceeds, a trustee of said trust in respect to said moneys."

The court decided, in substance, that the Augusta Factory stock, the Sibley Manufacturing Company's stock and the Langley Company's stock and the proceeds and income therefrom belonged to the estate of Mary S. Putnam; that 290 shares of the Delaware and Hudson Canal Company's stock and 78 shares of the New Jersey Central stock, found in the Lincoln Safe Deposit box standing in her name, also belonged to her estate, and that there could be no recovery for moneys expended from the proceeds of the sale of missing securities for improvements on Mrs. Putnam's residence, known as Putnam place, because of the bar of the Statute of Limitations. The court also decided that the securities, amounting to \$76,200, now on hand (including \$4,000 received for Sibley bonds, which had been sold), and the income thereon, and also 15 shares of the stock of the First National Bank of Saratoga Springs and 170 shares of Western Union Telegraph Company stock, standing in Judge Putnam's name, and which were impressed with the character of trust property and set apart by him for that purpose, should be divided equally between the children of Judge and Mrs. Putnam, and also that they are entitled to recover from the estate of Mary S. Putnam the sum of \$68,410, the amount of the proceeds of the sales by her of \$61,700 of securities standing in her name, with interest from the date of her death.

The estate of John R. Putnam was also held liable to said parties jointly with the estate of Mary S. Putnam for the said last-named sum, with interest. The court also awarded a judgment against the estate of Judge Putnam for \$24,610.75 for the balance of securities and cash which were received by him and which were not now on hand, which included the sum of \$5,750 for loss of certain securities occasioned by his neglect to dispose of the same when they had that value.

There was also awarded against the estate of Mary S. Putnam a judgment upon a note given by M. M. Shoemaker for the interest



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of the parties in certain real estate in Cincinnati upon their joining in a conveyance thereof, but the court declined to allow a recovery against the estate of Mrs. Putnam for the amount of her note for \$36,987 given to her husband as trustee. The defendant Corliss Sheldon, as administrator with the will annexed of John R. Putnam, deceased, has appealed from the entire judgment, and the plaintiff and the defendants Pendrick, as administrator with the will annexed of Mary S. Putnam, deceased, Israel Putnam and John Risley Putnam, have appealed from portions thereof respectively specified. Further facts are stated in the opinion.

*Albert Stickney* [*M. Edward Kelley* with him on the brief], for the plaintiff.

*Edgar T. Brackett* [*A. Pennington Whitehead* and *Rockwood & Salisbury* with him on the brief], for the defendant John Risley Putnam.

*James W. Verbeck*, for the defendants Harry P. Pendrick, as administrator, etc., and others.

CHESTER, J.:

The controversy arises because of the claim of the defendant Israel Putnam that his mother was the absolute owner of all the property received from her father's estate, and that there was no trust under his will. His interest in making this claim arises from the fact that under his mother's will he was the sole beneficiary except for a single small legacy to another. So far as this court is concerned it is settled that the estate was one held by Judge Putnam in trust for the benefit of his wife for life, with remainder over to their three children in equal shares upon her death.

It is evident that there were times when Judge Putnam was of the opinion that no trust was created, for he says in Exhibit 27, which has been received in evidence on this trial against his estate, but not against hers, that "the eighteenth clause of the will does not convey the estate to John R. Putnam as trustee, but the said clause and the twenty-first bequeaths the property therein mentioned to Mary S. Putnam. At the most the eighteenth clause gives to John R. Putnam a power to manage and control the estate bequeathed to his wife." This undoubtedly explains very much of his conduct with relation to this estate, especially that of taking and holding many of

the securities in his wife's name and of commingling the proceeds with his own and her own private funds and in a bank account in his name and that of his wife, upon which either could draw.

Notwithstanding he may have been at times of this opinion, it could not have been a very well-settled one, for he must at the same time have realized that there was a liability of his being charged as trustee for this estate, because when he received it he receipted therefor as trustee and his acts all through the management of the estate were inconsistent with this opinion. This is evident not only in his dealings with others, but with his wife in relation thereto. Also in Exhibit 27 he takes credit to himself for the amount of his commissions and expenses *as trustee*. So, too, the note which he took from his wife to balance the trust estate as shown by Exhibit 27 was made payable to "John R. Putnam as Trustee under the will of R. M. Shoemaker, deceased," the body of this note being written by the clerk of Judge Putnam under his direction and the note itself being signed by her and delivered to him. It is clear, therefore, that notwithstanding the opinion expressed by Judge Putnam in Exhibit 27 to the contrary, both he and his wife regarded the property received from her father's estate as held in trust. That being their understanding, and it having been so decided by the interlocutory judgment, the principal question to be determined now is as to the amount of the trust estate.

We agree in many respects with the conclusions of the learned trial court, but we will content ourselves in this opinion with discussing only those features of the case where we are compelled to differ from such conclusions.

In the first place we are convinced, notwithstanding the very able and ingenuous argument of the learned counsel representing Mrs. Putnam's estate to the contrary, that the Statute of Limitations does not stand in the way of the consideration of any question arising in the case on its merits. This defense had not been interposed at the time of the former trial but was first put in by the defendant Pendrick, as administrator with the will annexed of her estate, who was brought into the action in 1905 in the place of the late Charles H. Sturges, who was the executor of her will. It is sought by this defense to save her estate from liability for such parts of the principal of the trust estate as came to her hands more than

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six and more than ten years before the action was commenced both the six and the ten-year Statutes of Limitations being pleaded. Under the will of her father, as construed by this court in this action, the plaintiff and his two brothers became upon the death of their mother the absolute owners as tenants in common of the property given to Judge Putnam in trust for the benefit of his wife for life. The Court of Common Pleas of Hamilton county, O., in an action brought for the construction of this will, in which Judge and Mrs. Putnam and their three children were parties, in 1887 made a decree to the same effect. It was thus established that all the property received by Judge Putnam pursuant to the 18th clause of the will of his wife's father was trust property; that he held the legal title thereto as trustee; that he so held it for her benefit until her death, and that upon her death her three children became the absolute owners thereof in equal shares by virtue of the will. The children had no right to its possession or enjoyment so long as their mother lived. It was not payable to them until her death. It would be a strange rule for the administration of trust estates to hold that when the trustee because of his belief, mistaken or otherwise, that the trust was not valid or effective, permitted the life tenant wrongfully to take the legal title to the trust estate without the knowledge of the remaindermen so far as appears and hold it for a period long enough for the ten-year or the six-year Statute of Limitations to run, the remainderman, who begins his action before these statutes have run against him, is powerless to compel a restoration of and an accounting for the trust estate.

The Statute of Limitations does not begin to run until a cause of action accrues. This action was commenced, it is true, before the death of the life tenant, but by reason of her death soon thereafter it has become practically an action to compel the turning over of the trust estate to the equitable owners thereof.

Under the circumstances presented here we do not think the statute began to run against the plaintiff or his brothers until the death of their mother. *Gilbert v. Taylor* (148 N. Y. 298) is an authority for this conclusion. There the income of \$10,000 was given to a person for life and upon her death said sum was given to her sister. An infant son of the testator was the residuary legatee. The life beneficiary was appointed his testamentary guardian and a general

guardian was appointed to act in conjunction with the testamentary guardian. The guardians compelled the executors and trustees under the will to account and obtained a decree requiring the executors to transfer and turn over the estate in their hands to the guardians. The guardians paid the interest on the legacy to the life beneficiary for four or five years and after that time paid her a gross sum which enabled her to realize the interest. Shortly after the death of the life tenant the remainderman brought the action against the residuary legatee to whom the surviving guardian had paid the residue of the estate charged with the burden of the legacy. The Statute of Limitations was set up in defense and it was urged that the plaintiff's legacy had vested at testator's death and that more than ten years had elapsed since the cause of action accrued. It was held that although the legacy vested at the death of the testator, it did not become payable until the death of the life beneficiary and not until then did the cause of action arise and that the defense of the Statute of Limitations was, therefore, properly overruled.

To the same effect is *Lee v. Horton* (104 N. Y. 538).

In Perry on Trusts (5th ed. § 245) it is said: "A person may become a trustee by construction, by intermeddling with, and assuming the management of property without authority. Such persons are trustees *de son tort*. \* \* \* During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees; and they cannot avoid their liability by showing that they were not in fact trustees, nor can they set up the statute of limitations."

The cases cited in support of a contrary doctrine have no force as applied to the facts of this case for in none of them was the statute sought to be interposed in favor of the life tenant against the remainderman in a case where as here the life tenant without the knowledge of the remaindermen improperly took the legal title to the trust property to herself well knowing its character as such.

In the next place we think the court erred in holding that the Sibley Manufacturing Company stock, the Langley Manufacturing Company stock and the Augusta Factory stock did not belong to the trust estate, but to the estate of Mrs. Putnam. The Augusta Factory stock was included by Judge Putnam in Exhibit 27 as property received from the Shoemaker estate and on hand, and

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the Sibley Company stock and the Langley Company stock was included by him in such exhibit as property of the estate disposed of by him, the former for \$11,448 and the latter for \$2,130, so that it is apparent that he at least regarded these stocks as belonging to the trust estate.

The Sibley stock and the Augusta stock were shares in Georgia companies and the Langley stock was shares in a South Carolina company. Those stocks belonged to Robert M. Shoemaker at the time of his death and the claim is that under the laws of Georgia and South Carolina these stocks were real estate and that because the laws of those States required three witnesses to a will of real estate, and as the Shoemaker will had only two, none of these stocks passed under the will, but, as to them, the testator died intestate, and Mrs. Putnam received them as hers absolutely as one of the heirs at law as undevisee real estate. It is further claimed that under the laws of Georgia shares of stock of mining and manufacturing companies, whose principal investments are in real estate and machinery attached thereto, are deemed real property and under the laws of South Carolina a will is utterly void unless subscribed by three or more witnesses.

There appears to be no proof in the case that in 1887, under the laws of South Carolina, the stock of a corporation owning real estate was deemed to be real estate, nor is there any proof that either the Langley, the Augusta or the Sibley companies had their principal investments in real estate and in machinery attached thereto, so that the case is entirely wanting in evidence to make these stocks anything other than personal property which would pass by the laws of the domicile of the testator under his will. Nothing appearing in this record to show that these shares were real estate in 1887, the usual rules must apply and they must be deemed to be personal property, and as such were governed by the laws of Ohio, where the testator had his domicile. That being so, a good title to these stocks passed to the trustee under the will.

The fact that it was deemed necessary to go into the courts of South Carolina and Georgia and take proceedings for the purpose of procuring the transfer of the legal title to these stocks cannot alter the case or change the rights of these remaindermen, for they were not parties to either proceeding. Nor was Judge Putnam a

party to the proceeding in South Carolina in his capacity as trustee, but only as an individual. In the Georgia proceeding Judge Putnam appears to have admitted service of process as trustee, but both proceedings were apparently conducted by the consent of the parties thereto and as a convenient method of securing a transfer of the legal title of the securities, and there was no attempt in either to have determined the rights of the beneficiaries of the trust as between themselves or between them and the trustee. If there had been, all the beneficiaries would have been necessary parties in order to be bound, and the trustee in such case does not represent the beneficiaries. (*Matter of Straut*, 126 N. Y. 201; *Carey v. Brown*, 92 U. S. 171.)

We think, therefore, that these stocks stand in no different relation to this estate than the other securities which were received by Judge Putnam as a portion thereof, and that the Augusta stock which is now on hand should be divided equally among the remaindermen. The proceeds of the sale of the Sibley and the Langley stocks were reinvested in other stocks now on hand and in that way are to be also so divided.

Again, we are of the opinion that the Delaware and Hudson Canal Company stock and the stock of the Central Railway of New Jersey, which were found in the Lincoln Safe Deposit box standing in the name of Mrs. Putnam, should be regarded as part of the trust estate. It is true that neither of these stocks ever belonged to the testator Shoemaker, but that they were purchased after his death. They are each specified by Judge Putnam in Exhibit 27 as property purchased or held in place of that disposed of. It is entirely clear outside of Exhibit 27 that it requires both of them to make the trust estate good for the devastavit existing therein, and it seems reasonable to believe that both were purchased with trust money. It appears that Putnam place, which stood in the name of Mrs. Putnam, was destroyed by fire, and that in January, 1891, \$25,000 of insurance moneys for such loss were received and deposited in the joint bank account of Judge and Mrs. Putnam; that certain New York Central stock was soon thereafter purchased and the amount thereof paid for from the proceeds of such fire insurance in a check drawn by Judge Putnam upon such bank account; that the New York Central stock was thereafter sold and

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these 290 shares of Delaware and Hudson Canal Company stock purchased in place thereof and paid for upon a like check. If we stopped here there would be much better foundation for the claim that the Delaware and Hudson stock belonged equitably and legally to Mrs. Putnam, but in 1892 Putnam place was rebuilt, the title thereof still being in Mrs. Putnam's name, and an amount in excess of the \$25,000 insurance money was drawn from this same bank account in which the insurance moneys had been deposited and used in rebuilding and refurnishing the house, and in that way Mrs. Putnam received back to herself an amount exceeding the amount of the insurance moneys. So that the fact that this insurance money was first temporarily applied to the purchase of the New York Central stock and afterwards, upon the sale of that stock, to the purchase of the Delaware and Hudson stock is of no importance, for it leaves the purchase price of the Delaware and Hudson stock as having been taken from other funds than the insurance moneys, and such moneys were drawn from the joint account, where the moneys belonging to the trust estate as well as to Judge and Mrs. Putnam individually had been kept and intermingled by them. The court has found that there is no evidence that any of the stock of the Central Railway of New Jersey was purchased with trust funds. It is also true that there is no evidence that it was not purchased with such funds. There is a finding that thirteen shares of it were purchased by Judge Putnam with his personal funds and the certificate therefor issued in his wife's name. There is also a finding "that after the purchase of the said Delaware & Hudson Canal Co. stock and Central Railroad of New Jersey stock, John R. Putnam received all dividend checks on each of the said stocks respectively down to the time of his death, the same being payable to Mary S. Putnam, and the said stocks were found after his death in a safe deposit box leased by him and Mary S. Putnam." The fact that these stocks were taken in Mrs. Putnam's name is not of much force in view of the further facts that so large a portion of the trust estate was also so taken directly from her father's estate and so held during the life of the trust. This course of conduct cannot serve to deplete the trust estate to the prejudice of the rights of the remaindermen.

We think it the duty of a court of equity to exert itself to pre-

serve the trust estate intact, and where the relations of the trustee and the life beneficiary to each other and to the trust estate were such that each must have been fully advised of all the acts and dealings of the other with relation thereto, and where there has been such a commingling by them of the trust moneys with their individual funds as appears here, and no rights of creditors or other equities of innocent third parties intervening, we should hold that the burden is cast upon the representatives of the trustee and the life beneficiary to show clearly that these stocks were purchased with her money and not with that of the estate, and that they equitably belonged to her. That has not been done in this case.

There should, too, we think, be a recovery against the estate of Mrs. Putnam for the benefit of the trust estate in the amount of \$7,091 and interest for that amount of trust funds found by the court to have been applied in 1892 for improvements on Putnam place. This recovery was denied by the trial court on the ground that it was barred by the Statute of Limitations, which conclusion, as hereinabove stated, we think was erroneous.

Finally, we think the court should have allowed a recovery against the estate of Mrs. Putnam upon her note for \$36,987 and the interest thereon from the date of her death. This was made payable to Judge Putnam as trustee, and was evidently given as a settlement for that amount of shortage in the trust estate which she had received to her own use and over and above the securities on hand. It requires the entire amount of this note to make the trust estate good for the devastavit that has been occasioned. When it appears, as it does here, that many of the securities that belonged to the trust estate stand in Mrs. Putnam's name, and a large amount thereof was sold from time to time which would necessarily require her personal knowledge of the transaction, and that the moneys received therefor were received by her and her husband and deposited in a joint bank account kept in both of their names, and when, as a result of it all, just before leaving upon a long journey with her husband, from which he never returned, the note in question was given to him as trustee and given for value received, we see no reason why her estate should not be chargeable with the amount thereof for the benefit of the remaindermen of the trust estate when her conduct and that of her husband acting together in the man-



agement of such estate had caused it to be diminished, in some unexplained way, to the amount of such note.

When Mrs. Putnam received in her own name the securities from her father's estate which belonged to the trust, and when she received and purchased other securities with the avails of those disposed of, she received them with full knowledge of the trust and its conditions, and, therefore, any disposition or holding thereof contrary to the purposes of the trust was unlawful. She became, by her conduct in so receiving and disposing or holding these securities, a trustee by her own wrong in relation thereto, and she should be held liable for a note which she has given apparently to make amends to the trust estate for the amount of the shortage caused, in part at least, by her management thereof.

The Special Term decided that the estate of Mary S. Putnam, deceased, was liable for the sum of \$68,410, the amount of the proceeds of the sale of \$61,700 par value of certain securities standing in her name and which were received from the estate of her father. We think it is apparent from this record that the amount of receipts for these sales were in turn used in the purchase of the new securities now on hand and which we think must be divided among the remaindermen as part of the trust estate. That being so, her estate should not be charged with the amount and also with her note, given as we believe to balance the trust estate, for if that were done there would be a double charge against her. The judgment must, therefore, be modified accordingly. So also the judgment as against the estate of Judge Putnam should be modified so that there shall be a recovery against it only of any deficiency remaining in the trust estate after taking into the account the property here found to belong to it.

The judgment should be modified in accordance with this opinion and as modified affirmed, with costs against the appellant Israel Putnam and the representatives of the estates of Judge Putnam and of Mary S. Putnam in favor of the other parties who have filed briefs upon this appeal.

All concurred, except COCHRANE, J., who dissented in part in memorandum.

COCHRANE, J. (dissenting in part):

I agree with Mr. Justice CHESTER that the Statute of Limitations does not affect any question herein. I also agree with him that the Sibley Manufacturing Company stock, the Langley Manufacturing Company stock and the Augusta Factory stock belonged to the trust estate and that the estate of Mrs. Putnam should be held accountable therefor.

I think the estate of Mrs. Putnam is erroneously charged with over \$6,000, the amount of the Shoemaker note, for certain interests in Cincinnati real estate. There is no evidence on which to base the conclusion of her liability therefor except statements contained in letters of the executor of the Shoemaker estate to Mr. Sheldon and attached to his account as administrator of Judge Putnam's estate. This account including the letters was not received as evidence against the estate of Mrs. Putnam, and the record seems to be entirely destitute of evidence affecting her estate tending to make this a proper charge against her said estate.

In respect to all other questions involved herein I agree with the court below.

Judgment modified as stated in opinion, and as modified affirmed, with costs against the appellant Israel Putnam and the representatives of the estates of John R. Putnam and Mary S. Putnam in favor of the other parties who have filed briefs on this appeal.

Order, if not agreed upon, to be settled by CHESTER, J.

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In the Matter of the Application for the Revocation of Letters Testamentary of GEORGE M. BURR, as Sole Surviving Executor of the Estate of HENRY A. SHELDON, Deceased, Appellant.

ISABEL D. BURR, Appellant; MARY E. WIGGINS, Respondent.

Third Department, March 28, 1907.

**Executors and administrators — proceeding to revoke letters testamentary — petition should specify misconduct.**

In a proceeding under subdivision 2 of section 2685 of the Code of Civil Procedure for the revocation of letters testamentary on the ground that the executor is guilty of misconduct, the petition should specifically set forth the charges

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of misconduct and a removal should not be based on matters outside of the issues presented.

Although an executor has invested portions of the estate in western mortgages and has loaned money upon a promissory note, which investments are unauthorized, it is not ground for revoking his letters when the estate has suffered no loss thereby and his accounts have been judicially settled.

An executor is removed to protect the estate, not to punish him; and he should not be removed when the fund is not put in jeopardy.

**APPEAL** by George M. Burr, as sole surviving executor, etc., and another, from a decree of the Surrogate's Court of the county of Broome, entered in said Surrogate's Court on the 20th day of July, 1905, revoking letters testamentary.

*Taylor L. Arms*, for the appellant Isabel D. Burr.

*S. C. Millard*, for the appellant George M. Burr as sole surviving executor, etc.

*Isaac Weill*, for the respondent.

CHESTER, J.:

The decree appealed from revokes the letters testamentary issued to George M. Burr, the executor named in the will of Henry A. Sheldon, deceased. It was made upon the petition of Mary E. Wiggins, who was one of the residuary legatees and next of kin of said deceased. The proceedings were instituted under section 2685 of the Code of Civil Procedure, providing for the revocation of letters and under subdivision 2 thereof, which provides that they may be revoked: "Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office."

The following section requires that "a petition presented as prescribed in the last section, must set forth the facts and circumstances showing that the case is one of those therein specified." A petition was presented in this case and an answer was interposed raising issues to be tried and denying all the charges of misconduct on the

part of the executor. The surrogate, in his decision, assigned several reasons for removing the executor, relating to his management of the estate, only one of which was a cause assigned in the verified petition or within the issues framed by the petition and answer. One of these causes, which was entirely without the issues presented for trial, was in a finding by the surrogate that the executor was indebted to the estate in a large amount, evidenced by his note for \$10,984.96, dated November 9, 1899, and payable on demand, which he did not include in the inventory of the estate or in his account. This finding was based upon an entry contained in an account book covering 164 pages of the printed record, which had been received in evidence. It was urged on the argument of the appeal in behalf of the executor that no such claim was made in the petition for his removal, or litigated upon the trial, and that the first knowledge which the executor or his counsel had that any such question was involved was when the findings were made on the settlement of the case. The claim was also made on the argument that the note referred to had in fact been paid by the executor and the amount thereof included in the inventory of the estate and in his accounting. Notwithstanding this matter was entirely outside of the issues, in view of the serious nature of the charge involved in the finding, we deemed it but fair that the executor should have an opportunity to make the proofs, which it was claimed he possessed in relation thereto, to show its falsity. We, therefore, as preliminary to deciding the appeal, referred the matter, under section 2586 of the Code of Civil Procedure, to a referee to take testimony and report to this court, with his opinion, whether the note referred to was paid by the executor, and the amount thereof included in the inventory of the estate. (116 App. Div. 518.) The report of the referee has now come in, and he finds, upon evidence that is absolutely conclusive, that the note referred to was paid by the executor, and the principal sum included in the inventory and also in his account, and that the account also contained the accrued interest due on the note at the date of the death of the decedent. This report clearly emphasizes the impropriety of permitting the parties to go outside of the issues in a matter of this kind, and shows clearly that this executor in this respect, at least, has been subjected to a grave injustice, and leads us to say further that we need not dis-

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cuss the other matters outside of the issues assigned as causes of removal, none of which, under the circumstances and proof in this case, were deemed by us of sufficient moment to be the foundation of further inquiry under the order of reference which we made.

The only charge of substance within the issues which was assigned by the surrogate as a reason for the removal was that the executor had invested moneys of the estate in securities unauthorized by law, but that charge is rendered of no serious importance by reason of the findings of the surrogate that no loss has accrued to the estate on account of any investment made by the executor, and that he has never been compelled to foreclose any of the securities that he has taken for the estate. There was a further finding that the proceeding for the removal of the executor was not commenced until after the judicial settlement of his accounts and a distribution and division of the property made as provided by the decree upon such settlement. That decree recites that the executor has fully accounted for all the personal estate and personal property of the estate of said deceased which has come into his hands as such executor, and his accounts were thereupon judicially settled and allowed as filed and adjusted. This settlement, although termed an intermediate accounting, was made after due service of a citation therefor upon the petitioner. She was, therefore, bound thereby, and it has removed from the legitimate field of controversy many matters which appear to have been litigated in this proceeding. The reason of the surrogate for the removal seems to be that it was his duty to take into consideration all of the acts of the executor, whether before or after the decree of settlement, which in any way affected his conduct in the management of the estate. The authorities upon which he apparently relied, however, were cases which were not brought for the removal of the executors or trustees, but to charge them for losses by reason of unauthorized investments.

The power to remove an executor is given for the protection of estates, but that power should not be exercised when the purpose of the petitioner is clearly not to protect the estate but to punish the executor. (*Elias v. Schweyer*, 13 App. Div. 340; *Matter of Monroe*, 142 N. Y. 491.)

That is the rule laid down by the elementary writers. In *Perry on Trusts* (5th ed. § 276) it is said: "There must be a clear

necessity for interference to save the trust property" before an executor or trustee shall be removed. "The power of removal of trustees, appointed by deed or will, ought to be exercised sparingly by the courts." "Nor will a trustee be removed for every violation of duty, or even breach of the trust, if the fund is in no danger of being lost." "There must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy."

This rule is cited with approval in *Matter of O'Hara* (62 Hun, 534) and in *Elias v. Schweyer* (*supra*).

In Story's Equity Jurisprudence (13th ed. § 1289) it is said: "It is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce Courts of Equity to adopt such a course (*i. e.*, to remove trustees). But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of a proper capacity to execute the duties, or a want of reasonable fidelity." So, also, in *Matter of Monroe* (142 N. Y. 491), which was a proceeding to remove an administrator, the court says: "This is a proceeding, not to punish the administrator, but to protect the estate, and it was invoked in this case under circumstances wholly unnecessary and unjustifiable. The court found that the administrator and his sureties were financially responsible and able to make good the estate if it suffered loss. The unimportant and vexatious questions litigated in this proceeding could have been disposed of on the accounting and the administrator charged in a final decree for all losses he had caused the estate, if any such were proved."

In the brief of respondent's counsel he says, "the petitioner did not attempt in this proceeding to remove the executor for any loss occasioned by his acts while acting as such, but was brought for the purpose of reviewing his conduct as executor and determine whether or not he should continue in that office." Here is a concession which shows that the proceeding is entirely outside of the purposes for which it may legitimately be commenced and prosecuted under the law to remove an executor. The conduct of the executor, so far as his accounts were concerned, received judicial approval when his accounts were settled.

It there appeared that he had administered a personal estate received from the testator amounting to \$183,068.83, and which

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was increased under his management by the sum of \$16,964.63. It also appears that the testator had for many years, through the agency of this same George M. Burr, who was his son-in law, and whom he made his executor, invested considerable portions of his estate in first mortgages on lands in Western States, many of which were on hand at the date of his death, and that Burr as executor made a number of investments of moneys belonging to the estate in the same way. There was also proof that he and his coexecutor, the testator's widow, also loaned \$34,696.33 of moneys belonging to the estate to one Louis Sands upon his promissory note. It is true that these investments were unauthorized under the law relating to the administration of trust estates, but there is nothing in the evidence to show that they were not made in entire good faith and for what was believed to be for the best interest of the estate. Sands was a man, according to the evidence, to whom the testator had been in the habit of loaning money. He was the president of a national bank, the largest taxpayer in his city and a man, according to Mr. Burr's testimony, worth between one and two millions of dollars. The loan to him was repaid in full, with all interest thereon, and the surrogate so found. He also found and the decree on the accounting, which included all the investments which were questioned, shows that the estate never lost a dollar by any investments made by this executor.

After receiving and receipting for her distributive share pursuant to the decree on the intermediate accounting, the petitioner commenced this proceeding to remove him from his trust. It appears that there remains of the estate in his hands only \$3,770 which was in notes taken by the testator that had not been paid at that time and which amount is barely sufficient to pay the executors' commissions and the expenses of a final accounting. He is a man of abundant means, according to the proofs, to render the estate entirely secure in his hands and he has not been shown in any sense to be a person "unfit for the due execution of his office."

We think no just or legal cause for his removal was shown, and for the reasons stated that the decree appealed from should be reversed.

Counsel for the executor asks that there shall be refunded to him the costs and disbursements which he was ordered in the decree to

pay to the petitioner and which it is claimed were paid in order to perfect the appeal, but we find nothing in this record showing this payment and nothing upon which we can now properly compel restitution. That matter must, therefore, be left to a separate motion.

All concurred.

Decree reversed on law and facts, with costs against the petitioner personally, and said George M. Burr reinstated as executor.

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In the Matter of the Application for Letters of Administration  
with the Will Annexed of HENRY A. SHELDON, Deceased.

ISABEL D. BURR, Appellant; MARIE S. WIGGINS, Respondent.

Third Department, March 28, 1907.

**Executors and administrators — proceeding to appoint administrator  
with will annexed — unauthorized amendment.**

A petition for the appointment of an administrator with the will annexed was made upon the ground that one executor had died and the other had been removed. The petition did not show what relationship the person nominated bore to the estate of the deceased or that there was no other person entitled to letters as of prior right who were cited or had renounced. No action having been taken on the objections filed, the petitioner, without permission of court or further citation, filed another petition asking the appointment of an administrator with the will annexed.

*Held*, that the second petition was not an amendment of the original petition and had no place in the proceeding;

That the appointment of the person nominated was unauthorized, either on the first petition which did not show him entitled to letters, or under the second unauthorized petition.

APPEAL by Isabel D. Burr from a decree of the Surrogate's Court of the county of Broome, entered in said Surrogate's Court on the 18th day of October, 1906, appointing Theodore R. Tuthill administrator with the will annexed of the estate of Henry A. Sheldon, deceased.

*Taylor L. Arms*, for the appellant.

*Moses Weill*, for the respondent.



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COCHRANE, J. :

On June 25, 1906, the respondent, Marie S. Wiggins, filed in the surrogate's office of Broome county a petition having for its object the appointment of an administrator with the will annexed of Henry A. Sheldon, deceased. In such petition she described herself as one of the legatees and next of kin of said deceased. It was therein alleged that letters testamentary had been previously issued to George M. Burr and Scebelia H. Sheldon, the surviving executors named in said will; that one of said executors had died and that the letters testamentary issued to the other had been revoked; that the only next of kin of the decedent were the petitioner and Isabel D. Burr, a daughter.

On this petition a citation was issued to said Isabel D. Burr, returnable July 30, 1906. On the return of the citation Isabel D. Burr appeared specially for the purpose of objecting to the sufficiency of the petition and to the jurisdiction of the surrogate to appoint an administrator with the will annexed. No action at that time seems to have been taken in reference to the appellant's objections.

The next step seems to have been on October 12, 1906, when another petition was filed by the petitioner, in which she again asked for the appointment of an administrator with the will annexed. This latter petition is referred to as an amended petition. No order, however, appears to have been made permitting an amendment of the original petition, nor does the latter petition refer to the original petition or purport to be anything except a complete petition independent of anything which had occurred prior to the time when it was filed. It demands, among other things, that all persons required to be cited by the Code of Civil Procedure may be cited to show cause why a decree should not be made granting letters of administration with the will annexed. No citation was issued on this latter petition nor does it appear that the appellant had any notice thereof. It is clear that this latter petition improperly described as an amended petition has no proper place in the proceeding and must be disregarded.

The decree appealed from cannot be sustained by reference to the first petition. It nowhere appears what relationship Theodore R. Tuthill, the person appointed administrator with the will annexed, sustains to the estate of the deceased. If he is a stranger to the

estate, he could not be appointed without the citation or renunciation of all the legatees, next of kin, heirs, devisees and creditors. (Code Civ. Proc. §§ 2643, 2644.) The original petition should have made it appear that there was no person entitled to letters of administration prior in right to the person appointed unless such person prior in right was cited or had renounced such right. This the petition failed to do. This point was duly taken by the preliminary objections filed by the appellant and such objections should have been sustained. It does not appear that the surrogate at the time took any action on such objections. The decree recites that they were overruled; but the natural inference is from the language of the decree, and it is so expressly stated by respondent, that they were overruled after the second petition was filed, probably for the reason that it was thought that the second petition cured the defects of the first petition. As we have seen, the appellant was not in court in answer to the second petition, and as the first petition was insufficient to authorize the surrogate to make the decree appealed from, such decree must be reversed, with costs, and the proceeding dismissed, with costs.

All concurred; SMITH, P. J., in result.

Decree reversed, with costs, and proceedings dismissed, with costs; such costs to be paid by the petitioner personally.

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CHARLES W. BOSTWICK, as Receiver of the ALBANY AND HUDSON RAILWAY AND POWER COMPANY, Appellant, v. ALDEN M. YOUNG and Others, Respondents.

Third Department, March 28, 1907.

**Corporation — contract to pay for railroad construction in bonds and stocks — such contract not stock subscription — pleading — when complaint of receiver insufficient — when receiver estopped by action of corporation.**

A contract by a railroad to pay a contractor in bonds and full-paid non-assessable stock of the corporation for his work, labor and materials in constructing and equipping the road is not a stock subscription by the contractor, which makes him liable for the par value of the stock. Such contract is not a purchase of the stock and bonds to be paid for in work and property, but is a contract to accept full-paid stock and bonds as payment for the building of the road.

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The receiver appointed on the insolvency of such railroad is not entitled to recover from contractor the alleged value of the stocks and bonds received as compensation for the construction of the road, when it is not alleged that the cost of constructing the road and the value of the properties acquired from the contractor were of less value than the par value of the stock and bonds delivered in payment.

In any event, although the payment of the contractor in bonds and stocks were fraudulent, the receiver not being vested with rights personal to the creditors and merely standing in the place of the corporation, can maintain no action against the contractor to recover the alleged value of the stock and bonds, being, like the corporation, bound by an equitable estoppel.

APPEAL by the plaintiff, Charles W. Bostwick, as receiver, etc., from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Columbia on the 27th day of September, 1906, upon the decision of the court, rendered after a trial at the Columbia Special Term, sustaining separate demurrers interposed by the defendants to the plaintiff's complaint.

*Samuel B. Coffin* [*J. Rider Cady* of counsel], for the appellant.

*F. B. Church*, for the respondents.

SEWELL, J.:

The plaintiff, a receiver appointed in an action for the sequestration of the property of the Albany and Hudson Railway and Power Company, seeks to recover of the defendants the par value of certain stock of the company, alleged to have been fraudulently obtained by them from the company without consideration. It is somewhat difficult to determine from the mass of conclusions set out in the complaint what the issuable facts are that must be deemed admitted by the demurrer.

Divesting the complaint of all the conclusions of law and of fact, the material facts alleged in the complaint are as follows:

The Albany and Hudson Railway and Power Company was organized and incorporated for the purpose of building, maintaining and operating a railroad in pursuance of the Railroad Law (Laws of 1890, chap. 565 as amd.). The capital stock was fixed at \$2,500,000, and soon after the incorporation of the company the proper officers were authorized to execute, and did execute and issue 2,500 first-mortgage gold bonds of the par value of \$1,000 each. At a meeting of the board of directors it was unanimously resolved that the president

and secretary be authorized and directed to execute a contract with one George G. Blakeslee for the construction and equipment of the road and the acquisition of the properties and rights mentioned in the contract. It was also unanimously resolved that the officers of the company be authorized and directed to deliver to said Blakeslee, or his order, all the bonds, and 24,920 shares of the full-paid non-assessable capital stock of the company in accordance with the agreement, and at a special meeting of the stockholders, at which all were present, the minutes of this meeting of the directors were consented to and approved.

It is also alleged that the contract was executed by the president and secretary of the company and by Blakeslee; that thereafter and from time to time the board of directors authorized and directed the issuance and delivery to Blakeslee of certain of the bonds, and from time to time authorized and directed the officers of the company to deliver "certain shares of the alleged full-paid non-assessable capital stock of the said company," which said bonds amounting to 2,500, and the shares of stock amounted in the aggregate to 24,920 shares.

It is further alleged that Blakeslee was a mere dummy contractor and intermediary, and acted as such at the solicitation and direction of the defendants; that they caused him to execute the contract and he signed the same at their direction; that Blakeslee never actually constructed said road in whole or in part, and never performed any of the obligations of said contract; that the defendants caused all the stock and bonds to be issued and delivered to Blakeslee; that he did not pay for the same in cash or in property and parted with no value therefor; that the stock and bonds were issued to defendants, through said dummy contractor, without the payment by said defendants of any sum therefor, and that the defendants did not, nor did any of them, at that time or at any time thereafter, pay for said stock the par value thereof, or any sum whatever.

It appears by the contract which is made a part of the complaint that Blakeslee agreed to sell, or procure to be sold and delivered to the company, all the stock of the Greenbush and Nassau Electric Railway Company, the stock of the Hudson Light and Power Company, certain real estate and water rights and other property, and to construct and equip the road in accordance with the provisions of the contract, and that in consideration thereof the com-

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pany agreed to issue and deliver the stock and bonds to the contractor from time to time as the performance of his contract should progress, in such amounts as the board of directors should determine to be in reasonable proportion to the progress of the work, and upon completion of the agreement to issue and deliver to him all of the remainder of the 2,500 bonds and 24,920 shares of stock.

It is stated in the complaint that the Greenbush and Nassau Electric Railway and the Hudson Light and Power Company were merged in the Albany and Hudson Railway and Power Company; that the railroad was completed on or about the 22d day of November, 1900, and was thereafter operated by the company, and that Blakeslee resided in Westchester county during the whole time of the construction of said road and the acquisition of the properties mentioned in the contract.

The main grounds upon which the defendants rely to sustain their demurrers are: *First*. That the complaint does not allege an actual subscription or show that the defendants took upon themselves the obligations of subscribers by wrongfully appropriating the stock without paying for it. *Second*. That if the defendants assumed the obligations of subscribers the complaint is defective in not setting forth a breach of the defendants' promise or in failing to allege that the company did not receive full value for the stock and bonds by the construction and equipment of the road. *Third*. That the liability of the defendants, if any, is to the creditors of the corporation and not to the corporation or its receiver.

Assuming all that can be claimed by the plaintiff from the allegations in regard to the liability of the defendants to pay the corporation or its receiver the par value of the stock held by them, the liability of the defendants, if any, rests upon contract. It depends upon a promise, express or implied. Without a promise to pay, a party cannot be charged in this class of cases. (*Glenn v. Garth*, 133 N. Y. 42.) It is not alleged in the complaint that any express promise was made by or in behalf of the defendants, except to build the road and perform the other conditions of the contract, for the stock and bonds therein agreed to be delivered. Every fact and circumstance alleged show that there was no agreement to take stock and bonds otherwise than as a payment for work and property. The agreement, on the part of the contractor, was not to pay the par value

of the stock in cash. It was not to purchase the stock and bonds and pay for them in work and property ; but it was to accept full-paid stock and bonds in payment for the building of the road.

That was the only contract ever made by the defendants which has any bearing on the present issue. According to its language, the issue and delivery of the stock and bonds were made to depend upon the construction of the road, and the contractor had no claim to the stock, further than it was earned, and did not become a stockholder until it was earned and received in payment. If the signing of the contract imported that the contractor subscribed for the shares mentioned therein, if this be the true construction of the act of the contractor in entering into the contract, no agreement can be made to build a railroad by the transfer of stock and bonds to the contractor, without rendering him and the people for whom he may act, liable for the par value thereof.

In *Van Cott v. Van Brunt* (82 N. Y. 535) the court said, such a rule would seriously interfere with the construction of enterprises of this description, and would prevent the building of many railroads. "We are unable to discover any reason why stock and bonds may not be transferred to a contractor to pay for the building of a railroad, where the contract is made in good faith and with no fraudulent intent."

We think that this agreement does not fall within the case of an ordinary stock subscription, and that the action cannot be maintained unless it appears that the defendants assumed the obligations or liabilities of subscribers by wrongfully accepting and appropriating the stock without paying for it, so that an implied contract or promise is made out.

The conclusion is stated in the complaint that the contract was the culmination of a fraudulent scheme or conspiracy on the part of the defendants to acquire the stock without paying therefor, but the allegations in that respect wholly fail to support the conclusion. It appears that the corporation was formed for a legal purpose ; that the contract was one the company had power to make and that the stock was issued and delivered as full-paid stock with the approval and consent of all the directors and stockholders. There is no claim that the cost of constructing the road and the value of the properties acquired were less than the par value of the stock and

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bonds delivered, and for aught shown to the contrary, the company, by entering into the contract, put itself in position to get par value for the stock and the market value of its bonds.

There is no fact alleged showing or tending to show that the corporation did not actually receive all that was agreed to be done by the contractor in return for the stock and bonds or that a share of stock was issued otherwise than in payment for work or property. On the contrary, it is expressly stated in the complaint that the road was completed and the properties mentioned in the contract were acquired, and that the directors authorized the issuance and delivery of the stock and bonds "in accordance with the pretended agreement." In view of these statements it is not enough, to show a right of action against the defendants, to allege that Blakeslee never actually constructed the road or performed the conditions of the contract, or that the defendants did not pay for the stock when it was delivered to them or at any time thereafter. The plaintiff is bound to go further and allege in unequivocal terms that the stock was not issued or delivered by the company in payment for the construction of its road and the property acquired, or some other fact from which it may be inferred that the company did not receive the full or par value for the stock delivered to the defendants. In the absence of a definite allegation to that effect the natural and necessary conclusion from the facts and circumstances alleged is, that the defendants built the road and took the stock and bonds in payment therefor and not that the stock and bonds were delivered in violation of the statute. (See Stock Corp. Law [Laws of 1892, chap. 688] § 42, which has been since amd. by Laws of 1901, chap. 354). This is a case when the failure to deny a fact furnishes satisfactory evidence of it. "Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." (*Pringle v. Woolworth*, 90 N. Y. 510; *Nichols v. Mase*, 94 id. 160; *Demings v. Supreme Lodge, K. of P.*, 131 id. 522.) "Illegality is never presumed; on the contrary, everything must be presumed to have been legally done until the contrary is proved." (*Nelson v. Eaton*, 26 N. Y. 415; *Beardsley v. Johnson*, 121 id. 224.) Upon the facts alleged it is very plain that there was no agreement, express or implied, on the part of the defendants to pay the par value of the stock in

cash. Every fact and circumstance alleged shows that such an agreement was contrary to the intention of the parties, and that a recovery herein would not be upon an existing contractual relation, but in hostility to an express agreement between the corporation and the defendants.

The only point remaining to be considered is whether the facts alleged constitute a cause of action in favor of the plaintiff.

There can be no doubt that the appointment of the receiver did not vest in him a right which was personal to the creditors, or enable him to recover under circumstances in which the corporation could not have maintained an action. It is equally clear that the corporation itself would have no standing to demand that the defendants should pay the par value of stock issued to them as full paid-up stock, pursuant to an agreement which, as between the corporation and the defendants, was valid and binding. (*Thompson v. Knight*, 74 App. Div. 317; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Christensen v. Eno*, 106 id. 97.)

If we assume that the contract was voidable, because of a scheme to obtain the stock without paying for it; that there was fraud and collusion in promoting the company, in evading a direct contract and in causing the stock and bonds to be issued and delivered, neither the corporation nor its receiver is in position to complain or to assert any right against the defendants, for it clearly appears that it was all done with the consent and co-operation of all the officers, directors and stockholders, and that no other persons were concerned or interested in the corporation. (*Little v. Garabrant*, 90 Hun, 404; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263; *Seymour v. Spring Forest Cem. Assn.*, 144 id. 341.)

Fraud may furnish sufficient ground for rescinding a contract or for an action by a creditor, but it cannot be availed of as a means of recovery by a party to the scheme. The doctrine of equitable estoppel applies. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Bellden v. Burke*, 147 id. 558; *Bath Gas Light Co. v. Claffy*, 151 id. 24.)

It follows that the judgment of the Special Term should be affirmed, with costs.

All concurred; COCHRANE, J., in result.

Judgment affirmed, with costs.



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MAX FEINBERG, Respondent, v. CHAUNCEY D. ALLEN, Appellant.

Third Department, March 13, 1907.

**Conversion — sale by sheriff on execution — when question as to whether plaintiff was estopped from asserting title should be left to a jury.**

When a sheriff attaches property supposed to belong to a married woman and immediately after the levy serves the attachment upon her in the presence of her husband who states that he does not own the property, and thereafter an inventory is made certified by two disinterested freeholders, and, after judgment is entered in the action, the sheriff levies execution on the said property, advertises it for sale, and at the sale the husband for the first time claims ownership and thereafter sues the sheriff for conversion, the question as to whether the sheriff relied upon the statement of the husband and whether the latter was estopped from asserting title should be left to a jury.

It is not necessary to plead facts relied upon to create an estoppel, and where facts have been received in evidence without objection tending to show that the plaintiff in good conscience did not own the property as against the defendant sheriff, the evidence may be considered by the jury.

APPEAL by the defendant, Chauncey D. Allen, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Clinton on the 20th day of April, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

*W. H. Dunn*, for the appellant.

*Charles J. Vert*, for the respondent.

KELLOGG, J. :

It is claimed that the defendant, as sheriff, on March 18, 1905, sold the plaintiff's wood on an execution against his wife, and for that alleged conversion of his property he has recovered here. The defendant asserts that in February preceding an attachment against the plaintiff's wife was delivered to his deputy, who went to the place where the wood was and levied upon it, and immediately went to the residence of the plaintiff and his wife, served the attachment upon her, and that at that time the plaintiff stated

to him that he did not own the wood. Thereafter defendant's deputy measured the wood, caused an inventory to be taken and certified by two disinterested freeholders, and after judgment was entered in the action again went to the place where the wood was, levied the execution upon it, advertised the sale, attended at the place of sale for the purpose of the sale and at the sale the plaintiff first claimed that he was the owner of the wood. The defendant contends that these facts proved, or tended to prove, that the plaintiff did not own the wood and estopped him from asserting title to it.

The trial court, at the request of the plaintiff, charged that there was no proof in the case before the jury that the defendant acted upon any statement made by the plaintiff, to which the defendant excepted. The court evidently had it in mind that if the statement was made after the levy and was retracted before the sale that the defendant relying upon the statement had taken no action to his prejudice, overlooking entirely the fact that the defendant claimed that he relied upon the statement from the time it was made and after that measured the wood, caused it to be appraised, became liable for the appraisers' fees, again went to the place and levied the execution upon the wood, advertised the sale and attended upon the day of sale. Upon defendant's theory all of these acts had been done relying upon the statement and before it was retracted. The charge was, therefore, erroneous.

It was not necessary to plead the facts relied upon to create the estoppel. Such facts as a matter of evidence tended to show that the plaintiff in good conscience did not own the property as against defendant. In any event the evidence was received without objection and was proper for the consideration of the jury. The judgment and order should, therefore, be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

## INTERNATIONAL CHEESE COMPANY, Respondent, v. PHENIX CHEESE COMPANY, Appellant.

Third Department, March 13, 1907.

**Injunction to restrain use of trade name — right to name not lost by unauthorized use by others.**

When a manufacturer has established a market for cream cheese under the brand "Philadelphia cream cheese," the fact that others have attempted to appropriate the trade name without the owner's consent does not establish any abandonment thereof by him.

Nor does the fact that such manufacturer sells other brands of cheese together with the Philadelphia cheese, all being put out under a registered trade mark, destroy the right to the specific trade name "Philadelphia" as applied to one brand of cheese.

APPEAL by the defendant, the Phenix Cheese Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Otsego on the 29th day of March, 1906, upon the decision of the court, rendered after a trial at the Otsego Special Term, adjudging the plaintiff to have an equal right with the defendant to use the word "Philadelphia" in connection with the manufacture and sale of Philadelphia cream cheese, and restraining the defendant from claiming an exclusive right to use that word.

*Richard L. Sweezy*, for the appellant.

*Lynn J. Arnold*, for the respondent.

KELLOGG, J. :

Cream cheese, as it is now known, was first prepared and offered for sale by one Lawrence at Chester, N. Y., in the year 1872. It was put upon the market as cream cheese; others began to manufacture the cheese and Mr. Lawrence adopted the trade name of "Star Brand" for his product, and other manufacturers made and marketed cream cheese under the trade name "World Brand," "Globe Brand," "Eagle Brand," "Clover Brand," "White Rose Brand," and other brands. In 1880 one Reynolds, who was in the cheese business in New York, made a contract with Lawrence and

another in his locality to furnish him cream cheese with the label and marks upon it "Philadelphia Cream Cheese," and they were not to sell any of their product under that name elsewhere. This cheese was not different in its composition from other cream cheese upon the market. Through different transfers and business arrangements the defendant has succeeded to the business of said Reynolds, and the defendant and its predecessors, ever since 1880, have been procuring and selling, or manufacturing and selling, cream cheese under the name of "Philadelphia Cream Cheese," and have extensively advertised it, quoted and caused it to be quoted to trade journals, and have established an extensive reputation and sale for it.

The plaintiff was incorporated in 1903 and began business at Cooperstown, N. Y., and began the manufacture and sale of cream cheese, calling its product "Mohican Brand," and it continued to sell its product under that name until April, 1905, when certain customers began to call for "Philadelphia Cream Cheese," and it discovered that there was an established market for cream cheese of that name, and it then began to manufacture and sell a part of its product as "Philadelphia Cream Cheese," selling its Mohican brand where it or cream cheese simply was ordered, but if Philadelphia cream cheese was ordered supplying its so-called Philadelphia cream cheese. Prior to the commencement of the action two or three other manufacturers had attempted to use the word "Philadelphia" in connection with their cream cheese, but the defendant protested against such action, threatened litigation, and the use of the word "Philadelphia" was abandoned by such dealers, and no manufacturers or dealers except the plaintiff and the defendant now use the words "Philadelphia Cream Cheese," or have used it in designating their product except as before stated. Immediately upon plaintiff's beginning to use that word the defendant remonstrated and threatened legal proceedings to enjoin such use and this action was promptly brought.

It appears from the evidence that at various hotels and restaurants in New York, Philadelphia and other places, upon the bills of fare, under the head of cheese, Philadelphia cream cheese is the only cream cheese mentioned, and where guests order it with the wrapper upon it, it proves that the cheese is not that brand, but is

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of the "Star" brand, "World" brand, or some other brand, and the plaintiff claims that such use of the word "Philadelphia," and the fact that in trade journals the Philadelphia cream cheese is quoted, makes the name "Philadelphia" a general name applicable to cream cheese and not a trade name belonging to the defendant. The findings show that the defendant knew that the words "Philadelphia Cream Cheese" were used upon the various bills of fare of hotels and restaurants, but it does not appear that the defendant knew that the cheese supplied upon an order from such bills of fare was not its Philadelphia cream cheese.

It is probably true that there is much more cream cheese sold at retail and by the different hotels and restaurants and to private consumers under the name Philadelphia cream cheese than is actually manufactured by the defendant, but the fact that others have attempted to appropriate the defendant's trade name because it is valuable does not deprive the defendant of the value which it has given it. It has not consented that its trade name shall be used indiscriminately by jobbers, manufacturers and dealers. The evidence shows that wherever it has known of a violation of its trade name or rights it has interfered and prevented it, and the fact that hotels and restaurants were selling other brands of cheese as Philadelphia cream cheese does not show an intent by defendant to abandon its trade name or to make it public property.

The defendant makes and sells many other kinds of fancy cheese, and has registered a trade mark "X-L-C-R," surrounded by a diamond-shaped outline, with the name "Excelsior" over it, and has that trade mark upon its cream cheese and upon all its various varieties of cheese. But the fact that it has a trade mark used upon and applicable to all of its various products does not destroy its rights to its trade name "Philadelphia," as applied to its cream cheese.

The judgment appealed from should be reversed upon the law and the facts and a new trial granted, with costs to the appellant to abide the event.

All concurred; SEWELL, J., not sitting.

Judgment reversed on law and facts and new trial granted, with costs to appellant to abide event.

In the Matter of Proving the Last Will and Testament of DANIEL SMALL, Late of the County of Montgomery, Deceased.

JOAB SMALL and Others, Appellants; ADAM WALRATH, as Executor, etc., of DANIEL SMALL, Deceased, Respondent.

Third Department, March 13, 1907.

**Will — action to establish — burden of proof where testator's physician is sole beneficiary — evidence — lay witnesses may not characterize mental state of testator — erroneous holding as to burden of proof.**

When a testator leaves his relations and goes to live with his physician, and eleven days thereafter makes a will naming the physician as sole beneficiary, the burden is upon the latter to show that the will was not procured by undue influence.

Lay witnesses called to show the mental capacity of a testator may characterize his acts as rational or irrational, but cannot characterize the acts as those of a rational or irrational person.

When the evidence of such lay witnesses is objected to as improper, incompetent, irrelevant and immaterial, and because the question is improper in form, a party who subsequently makes the "same objection except as to form" is entitled to the benefit of the other grounds of objection stated.

When on a jury trial of an action to probate a will the court erroneously holds that the burden of proof is upon the contestant, and, although the proponent gave his proof first, subsequently holds that the contestant is not entitled to close the case, an exception to the court's ruling on these matters requires a new trial.

It is immaterial in such action whether said statements of the court be considered as erroneous rulings or erroneous statements informally made during the trial, for in either event a new trial will be granted if the remark were erroneous and prejudicial to the defeated party.

SMITH, P. J., dissented in part, with memorandum.

APPEAL by the contestants, Joab Small and others, from an order of the Supreme Court, made at Montgomery Trial Term and entered in the office of the clerk of the county of Montgomery on the 18th day of July, 1905, denying the contestants' motion for a new trial made upon the minutes.

*II. V. Borst* and *E. A. Brown* [*A. J. Nellis* of counsel], for the appellants.

*J. Keck* and *N. J. Herrick* [*Edward R. Hall* of counsel], for the respondent.

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KELLOGG, J. :

The report of this case in 105 Appellate Division, 140, gives the history of the litigation and many of the facts. Other facts are: Twenty-two days before his death the testator came to reside with Dr. Walrath, the principal beneficiary, and remained with him. The will was executed eleven days thereafter. There had previously been no particular relations between them except the doctor was his tenant. The testator was suffering from typhoid fever, but was around the house, not going out upon the streets. An attorney prepared the will by the directions of and delivered it to the doctor; the doctor delivered it to the testator. The attorney first saw the testator in the matter later when he acted as one of the subscribing witnesses. The estate is worth about \$7,500. For nearly three years before residing with the doctor the testator had resided with the Taylor family, was much attached to them and had intended to will his property to them. They did not know he had left their place permanently, but expected his return. Prior to the making of the will there is no statement of any intention to benefit the doctor by will except one of the doctor's patients heard him tell Mrs. Walrath about the time the will was executed, "You took me in when I had no place to go; you have made a home for me here, I want to give Ad Walrath (the doctor) what I have got and stay here as long as I live."

Under these circumstances, when a physician as chief beneficiary seeks to acquire the property of his patient by probate of a will, it is not asking too much that he make his title clear. The unusual circumstances speak quite eloquently. Courts should be careful to see that the will of the physician is not probated as the will of the patient. The evidence of the subscribing witnesses, of the members of the doctor's family and of certain of his patients who while there for treatment saw the decedent, tend to show that he knew the contents of the will and that he really intended and desired that the doctor should have his estate. And we cannot say that the verdict of the jury is against the weight of evidence. Upon the other hand, if the jury had decided against the will, the verdict would not be contrary to the evidence. These statements are made solely to show that the question was a close one and that

justice requires that the case should be decided upon its merits uninfluenced by other considerations.

Many lay witnesses called by the contestants, after having stated acts of and conversations with the testator, were allowed, over contestants' objection and exception, to answer whether they were the acts and conversations of a rational or irrational person. The respondent relies upon *Paine v. Aldrich* (133 N. Y. 544) and the questions were apparently taken from that case. There the plaintiff's lay witnesses at the trial were permitted to swear that the acts and conversations related by them were the acts and conversations of a rational person, but were not permitted to give a direct opinion as to the mind of the party or their impressions whether he was rational or irrational. The plaintiff was defeated and appealed, and the only question before the Court of Appeals was whether the plaintiff was prejudiced by the exclusion of the opinion of the lay witnesses as to the state of mind of the grantor. In passing upon that question the court remarked that laymen must be confined to saying whether the acts and conversations were rational or irrational or were those of a rational or irrational person, and held that no error prejudicial to the plaintiff existed. It was not before the court whether a layman could say that the acts were those of a rational or irrational person, for that question below was permitted to the plaintiff and the party against whom the decision was made did not appeal. The report of the case at General Term makes the facts more apparent. (38 N. Y. St. Repr. 402.)

The evidence in question here in effect characterized the mind of the decedent. "The rule authorizes the witness to characterize the acts, but not the person doing the acts. The observer may state that the act impressed him as irrational, but not that the person impressed him as irrational." (*People v. Pckurz*, 185 N. Y. 470, 481.) The questions were, therefore, improper and should have been excluded.

But it is urged that the appellants here are not in a position to raise this point. The question originally was asked the witness Rogers. It was objected to as "improper, incompetent, irrelevant and immaterial; witness not shown competent to speak; that the question is improper in form and does not direct her attention and ask her if certain specific acts and certain specific conversations were



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rational or irrational, and further, on the grounds urged, which we do not waive, that it is reopening their principal case."

Without waiting for a ruling the wording of the question was somewhat changed, and contestants then made the "same objection except as to form." The objection was overruled and exception taken. Like questions were put to many other witnesses, to which objection was made the same "as to a similar question put to Carrie H. Rogers." The respondent urges that by waiving the objection as to the form of the question the appellant has waived this objection. That view of the occurrence is too technical. The real substance of the objection was the point now under discussion, and the objection was made so many times during the trial that the court was clearly aware that the contestants were insisting that a layman could not answer this question which is permitted alone to experts. This objection went to the substance and not to the form of the question. By analyzing the objections there were eight specifications, one of which is as to the form of the question; another that the witness is incompetent to speak; another that the question does not direct the attention of the witness and ask if the acts and conversations were rational or irrational. By eliminating the objection as to form the other seven objections stand and are certainly sufficient to prevent a lay witness from giving this expert opinion.

At the beginning of the trial the proponent put in the evidence of the subscribing witnesses and then asked the court as to the proper course to be followed in the introduction of testimony. A discussion took place between the counsel and the court as to the order of proof and the court decided the order in which the remainder of the evidence should be put in and then said: "Then there is the question as to who has the burden of proof, but I am not satisfied as to that at present. I will meet the questions as they come up." The proponent then called another witness who gave testimony tending to show the competency of the testator and the absence of duress, and then rested his case. The court then remarked: "I think the burden is upon the contestants to show incompetency or undue influence. We do not determine the validity of the will or the validity of its execution. We determine just simply two questions for the information of the surrogate. I shall hold, unless I am convinced otherwise, that the contestants

have the burden here, and that they really ought to have opened the case. If it had been called to my attention at the opening of the case I should have required the contestants to put in their testimony first, but we have drifted into this situation. I am going to hold that the burden of showing incompetency or undue influence is upon the contestants. Contestants excepted." The court: "I am going to regard the proof put in so far as simply formal proof." The counsel for the contestants then said: "Since Your Honor has determined the law to be as you have determined, without denying that, that is the law, and stating to the court that we did not so understand it, that we understood the burden was upon the plaintiff (proponent) and that the plaintiff (proponent) so understood it, we now ask that there be granted to this defendant (these contestants) the right to close the case to the jury under this ruling," to which the court remarked: "I will pass on that when we come to it; I will say you must now put in all the proof you intend to introduce and I shall then hold strictly to rebuttal proof, what I regard as rebuttal proof, when the testimony comes in, and I refuse to rule on the right to close. Contestants excepted." At the close of the testimony the contestants requested to be allowed to close the case to the jury, which the court denied, and they excepted. Nowhere else in the case is any question raised by counsel or discussed by the court as to the burden of proof. The charge of the court and the requests of counsel are silent upon that point. It seems that all considered that the court had settled and disposed of that matter.

It is now seriously contended that the court did not rule upon the question; that it merely made remarks about the order of proof which were not properly a subject of exception and review, and that counsel, by requests to charge, should have again brought the matter of the burden of proof to the attention of the court. By carefully reading what took place between counsel and the court it is evident that all understood the question had been decided. If the court had not decided the question when counsel took exception to the decision and made another motion expressly based upon that decision, it was clearly the duty of the court to inform counsel that the matter had not been decided and put the matter right upon the record. Assuming that the court had decided the matter, the contestants' counsel very properly omitted to again ask a decision

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upon a matter which had already been decided. Three separate things occurred upon the trial which, when considered with reference to each other, show that the court had actually disposed of the burden of proof. (1) After the subscribing witnesses were sworn proponent asked the court to determine the order of proof, which was done, the court expressly reserving the question as to the burden of proof. (2) After the proponent rested the court brought up the reserved matter as to the burden of proof and held it to be upon the contestants, to which the contestants excepted, and referring to the ruling, asked the court to give them the right to close the case. The court expressly reserved that question for further consideration. (3) At the close of the testimony this reserved question as to the right to close was again brought up and decided against the contestants. It is clear that the burden of proof in this case was upon the proponent, and that the announcement of the court upon that subject was error. The situation, however, was peculiar. The proponent and the contestants began the trial, both assuming that the burden of proof was upon the former. During the trial the court decided of its own motion that it was upon the latter. If the court was right in this decision, then the contestants had suffered the proponent to open the case and might perhaps be held by the court to have waived their right to close by practically conceding it to the proponent by permitting him to open. Therefore, aside from the question of burden of proof, the particular manner in which this case had been tried made it very proper for counsel, after the decision of the former question, to have the court rule as to which party might close the case.

It is evident the contestants understood the matter had been decided and excepted to the decision, and the facts gave good reason for such understanding. The remarks of the court will not now be given a technical construction for the purpose of avoiding an exception which the counsel has taken and which the court permitted to remain in the record. But it is immaterial whether we view the statement of the court as an erroneous ruling, exception to which constitutes error of law, or treat it as an erroneous statement informally made by the court during the trial. It is well established that where the court makes a remark which is not intended or understood as a ruling upon a legal proposition, and that remark

is erroneous and probably prejudicial to the defeated party, that the court may set aside the verdict for that reason. (*Davison v. Herring*, 24 App. Div. 402.) It is, therefore, immaterial to determine whether the court intended to or did make a formal ruling.

The heirs to this estate have a right to it in the absence of a valid will, and whether there is a will should be determined upon the strict merits and the law of the case, unprejudiced by any erroneous statement of the court which may have misled the jury.

The order should be reversed and the motion to set aside the verdict granted, and a new trial ordered, with costs to the appellants to abide the event.

All concurred, SMITH, P. J., in memorandum, and COCHRANE, J., concurring in result on the first ground mentioned in opinion.

SMITH, P. J. (concurring):

I concur in the reversal of this case on the ground that the trial judge improperly ruled that the defendant had the burden of proof. I do not agree that the judgment should be reversed, because of the ruling admitting the evidence of a lay witness that certain acts described were the acts of an insane person. To hold that a lay witness may characterize acts sworn to as rational or irrational, and that he cannot say that such acts were acts of a rational or irrational person is, to my mind, splitting hairs, and, notwithstanding the ruling relied upon in the prevailing opinion in *People v. Pekarz* (185 N. Y. 470, 481), it has never been held, and I do not believe that it ever will be held, that a judgment should be reversed because a lay witness was allowed to swear that certain acts described were those of an insane person. While such artificial distinctions may be indulged in for the purpose of sustaining a judgment, it cannot be that the questions are so far variant as to cause the reversal of a judgment otherwise properly supported.

Order reversed and motion to set aside verdict granted and new trial ordered at the next Trial Term in Montgomery county, with costs to appellants to abide event.

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JOHN H. PITKIN and WALTER J. PITKIN, Appellants, v. MATTHEW CLIFFORD, Respondent.

Third Department, March 13, 1907.

**Justice's Court — when return of justice of peace may be amended.**

When on a motion to amend the return of a justice of the peace it appears by the affidavit of the justice that a judgment rendered on the defendant's default was made on the oral evidence of the plaintiff reduced to writing instead of upon a verified complaint as erroneously stated in the return, the return should be amended to show the true facts.

(Per COCHRANE, J.): Although there are authorities to the effect that the return of a justice of the peace may not be contradicted by an amended return, they do not apply to a case where the justice admits a mistake and seeks to correct it. On the same principle a mistake admitted by the justice may be corrected on motion of a party.

APPEAL by the plaintiffs, John H. Pitkin and another, from an order of the County Court of Saratoga county, entered in the office of the clerk of said county on the 26th day of December, 1906, denying the plaintiffs' motion to require the justice before whom this cause was originally tried to make a further and amended return.

*Hiram C. Todd* [James A. Leary of counsel], for the appellants.

*Willard J. Miner*, for the respondent.

KELLOGG, J. :

The return of the justice shows the appearance of the plaintiffs and that the defendant did not appear; that the plaintiffs complained by verified complaint and that, after waiting an hour, the defendant not appearing, he rendered judgment upon the verified complaint. The alleged complaint purports to be sworn to by one of the plaintiffs before the justice on the day judgment was rendered. The moving papers tend to show, by the affidavit of one of the plaintiffs, the justice and the attorney who appeared for the plaintiffs, that the complaint was oral, that the plaintiff was sworn and orally gave evidence which was reduced to writing and which constitutes the alleged verified complaint. By the amended return the plaintiffs seek to have returned a statement of what actually

took place before the justice. The important circumstance sought to be returned is that what is called the verified complaint by the justice was in fact an abstract of the oral testimony. If the plaintiffs produced evidence before the justice and the justice in his return has called that evidence a verified complaint, it would be a miscarriage of justice that plaintiffs should now be defeated on account of such an error by the magistrate. If plaintiffs' oral evidence was taken in court it is not, perhaps, very material what the justice called it. The court wants the facts, and the mistake of the justice in calling the plaintiffs' testimony a verified complaint cannot vitiate the proceedings.

The order of the County Court should be reversed, with costs, and the motion for an amended return granted, without costs.

All concurred.

COCHRANE, J. (concurring):

It has been held that a return of a justice may not be contradicted by an amended return. (*Barber v. Stettheimer*, 13 Hun, 193; *Fitzgerald v. Fitzgerald*, 25 id. 319; *Bennett v. Taylor*, 70 id. 51; *Thompson v. Sheridan*, 80 id. 33.) Those cases probably express the general rule. But such rule should not be extended beyond the facts to which it has been applied. If a justice makes a mistake in his original return it certainly should not be held that he is foreclosed from correcting his own mistake. In Wait's Law and Practice (Vol. 3 [5th ed.], p. 962) it is said: "If a return is defective on account of some mistake made by the justice, either in omitting or in erroneously stating material matters, he may apply to the County Court for leave to correct or amend his return." The author cites no authority in support of his proposition. But in *Simpson v. Carter* (5 Johns. 350) a justice was permitted on his own motion to correct his return where he had been imposed on by the fraud of one of the parties. No good reason exists why the same privilege should not be accorded to him in case of a mistake. On the contrary, every argument is in favor of the correction of mistakes. The denial of such a privilege would be manifestly unfair not only to the justice, but to the party against whom the mistake is made. The motion in this case is in form made by

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one of the parties, but it is based on an affidavit of the justice showing that an erroneous return has been made by him as a result either of his inadvertence or misinformation. If on this affidavit the justice himself were asking for leave to correct his return no authority of which I am aware holds that his request should be denied. This motion, although made by the plaintiffs, should be considered from the standpoint of the justice based as it is on his affidavit, and should be treated as though it were in fact made by him. Thus considered, the motion should have been granted. The opposing affidavits show that the return already filed is correct, and that the proposed amendment would pervert the facts. If the justice makes a false amended return the defendant will have his remedy, but the justice should be at liberty to have his return state what he claims to have been the facts.

Order reversed, with ten dollars costs and disbursements, and motion for amended return granted, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CORNELL  
VAN GAASBECK, Appellant.

Third Department, March 18, 1907.

**Crime — manslaughter in the first degree — evidence — erroneous exclusion of testimony as to defendant's good character.**

On the trial of an indictment for manslaughter, the defendant may show that he had the reputation of having a quiet, peaceable disposition, and it is not necessary to show his general reputation.

One accused of crime may show that his reputation among people who know him best is such as rendered it improbable that he would be guilty of the particular crime charged.

As evidence of good character, standing alone, may create a reasonable doubt of guilt, the exclusion of such evidence is reversible error.

APPEAL by the defendant, Cornell Van Gaasbeck, from a judgment of the County Court of Ulster county, rendered on the 15th day of January, 1906, convicting the defendant of the crime of manslaughter in the first degree.

*Augustus H. Van Buren*, for the appellant.

*Frederick Stephan, Jr.*, District Attorney [*Howard Chipp* of counsel], for the respondent.

KELLOGG, J. :

The crime was committed in the town of Woodstock, where the defendant was born. For the last five or six years before the trial he had lived in that town, but prior to that time he had resided for many years in the city of Kingston and was well known there.

One Merritt, who resided in the city of Kingston, swore that he had known the defendant for twenty-five or thirty years; that defendant had worked on his farm for him, on and off, three or four or five years, whenever he wanted extra help; he was acquainted with the reputation and character of the defendant so far as relates to whether or not he is of a quiet and peaceable disposition or otherwise. To the question as to what his reputation is, the objection that no proper foundation had been laid for the proof and that it was not a proper way to show character was sustained and the defendant excepted.

A policeman of the city of Kingston for the last nineteen years had known the defendant for thirty years; knew him whenever he was in the city and knew his character as to being a peaceable and quiet man. To the question as to what the character is, the same objection was sustained and the defendant excepted.

This evidence probably related to the reputation of the defendant at Kingston and not in the town of Woodstock. The remoteness of time and place might weaken the testimony, but the fact that the man by living at Kingston many years before and up to five or six years before the trial had established a reputation for peaceableness and quietness was some evidence that that character had continued, especially in the case of a man fifty-five years of age. (*Sleeper v. Van Middlesworth*, 4 Den. 431; *Graham v. Chrystal*, 2 Keyes, 21, correctly reported in 2 Abb. Ct. App. Dec. 264.)

When it is sought to impeach a witness for truth and veracity the proper inquiry is as to his general reputation. (*Carlson v. Winter-son*, 147 N. Y. 652.) But the cases seem to permit the inquiry as to his reputation for truth and veracity without inquiring as to his general reputation. And while perhaps his general reputation



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in other respects may be involved, it is clear that the question aimed solely at truth and veracity is the most logical one. A man's reputation may be so good in all other respects that small lapses in regard to truth may leave a balance on the side of a good reputation. His general reputation, therefore, may not give the same definite information as to his truthfulness as a direct inquiry on that subject. A known gambler has not a good reputation, but he may have an excellent reputation for truth and veracity. If a man is on trial for murder, the fact that he is truthful has little bearing upon the probability of his guilt. If the charge is forgery, his reputation as a moral man has little bearing upon that question. This defendant was on trial for killing his best friend, and the principal evidence of his connection with the crime was the fact that the deceased had been at defendant's cabin for some days; that they were more or less drunk, and that the deceased was found dead in the cabin, with other circumstances connecting the defendant more or less with the offense. Nobody knows just what caused the act, but it may fairly be inferred to have been a brutal cold-blooded murder. The assailant left the deceased in an unconscious and dying condition, and he died several hours after. If the fifty-five years of life of the defendant had given him among the people who knew him best a reputation as a quiet and peaceable man it might, in the minds of the jury, have some bearing upon the question whether he was guilty of the brutal murder of his friend.

While the books are full of statements that the defendant may show his good character from general reputation, the authorities are not entirely clear in this State that the good character and the general reputation means a general good character or his general reputation in the respects which relate to the trial, the qualities of his character which are challenged by accusing him of the crime. Wharton states the general rule as follows: "And the character he is entitled to prove must be such as would make it unlikely that he would be guilty of the particular crime with which he is charged." (Whart. Cr. Ev. [8th ed.] § 60.)

"The evidence of good character offered by the accused must relate particularly to that trait of character which is involved in the crime charged, so that the proof of good character will render it

unlikely that he would be guilty of that particular crime." (12 Cyc. 413.)

In *People v. Seldner* (62 App. Div. 357, 363) the defendant was on trial for grand larceny and several witnesses were asked if they knew the reputation of the defendant for honesty and integrity, the court remarking that while impeaching witnesses to attack a man's character must show a knowledge of his general reputation, that where the defendant called witnesses to show his good character, as evidence on the merits, the same rule did not apply, and the judgment was reversed for the exclusion of testimony as to defendant's character for honesty and integrity, the court saying: "The charge involved defendant's honesty; it was pertinent to the issue, therefore, for defendant to show good reputation for honesty and integrity," citing Wharton, *supra*, and other authorities.

The question here is not whether the character inquired about must relate to the traits involved in the alleged crime, as suggested by the authorities above cited, but may the inquiry relate to the qualities involved in the crime; not whether the inquiry must relate to character for peaceableness or quietness, but, in a case like this, may it relate to such reputation. A man on trial for a crime may have many traits of character which he may not desire to discuss before the jury; but if there is a redeeming feature in his character and that feature points to the improbability of his having committed the crime it would seem that he is entitled to the benefit of the evidence. A bad character for truth and veracity, for morality, and in other respects, does not make the person burdened with it an outlaw, but when he is accused of crime he may show that his reputation is such among the people who know him best as to render it improbable that he would be guilty of the particular crime charged against him.

Evidence of good character may of itself create a reasonable doubt, when without it none would exist. (*People v. Bonier*, 179 N. Y. 315.)

The conviction and judgment should be reversed and a new trial granted.

All concurred.

Conviction and judgment reversed and new trial ordered in the County Court of Ulster county.

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Third Department, March, 1907.

In the Matter of the Estate of JOSEPH H. GRIFFIN, Deceased.

WILLIAM S. LAWRENCE, Appellant; GUY C. DEWEY and DELIA M. D. HARRIS, as Executors, etc., of DAVID D. D. DEWEY, Administrator, etc., of JOSEPH H. GRIFFIN, Deceased, Respondents.

Third Department, March 18, 1907.

**Executors and administrators — setting off household furniture for widow by appraisers.**

In setting off household furniture not exceeding \$150 in value to a widow, under subdivision 4 of section 2713 of the Code of Civil Procedure, the appraisers, when the total value of the household furniture is less than that sum, cannot make up the balance by giving her farm animals and other property.

APPEAL by William S. Lawrence from a decree of the Surrogate's Court of the county of Franklin, entered in said Surrogate's Court on the 24th day of September, 1906, settling the accounts of the administrator of the estate of Joseph H. Griffin, deceased.

*W. J. Saunders*, for the appellant.

*A. W. Sheals* [*J. Frank Zoller* of counsel], for the respondents.

KELLOGG, J.:

By the inventory the appraisers, in Schedule A, set off to the widow the specific items of personal property as directed by subdivisions 1 to 4 of section 2713 of the Code of Civil Procedure. In Schedule B they set off to her the remaining household furniture of the value of \$28.40, and not finding enough furniture to make up \$150 added \$137.60 of value in cows and other property. By Schedule C, under subdivision 5 of the section, they set off to her \$150 of other property. The creditors, at the making of the inventory and upon the accounting, contended that the \$137.60 in Schedule B was assets to be accounted for by the administrator and could not properly be set off for the widow. The surrogate held the appraisal proper and gave the administrator credit for the amount. Subdivision 4 of the section, which directs the appraisers to set off other household furniture not exceeding \$150 in value, is relied upon to sustain the action of the appraisers and the surro-

gate. The language of the statute is plain, and the most liberal construction of its provisions cannot bring cows and property of that class under the head of household furniture. (*Matter of Libolt*, 102 App. Div. 29; *Baucus v. Stover*, 24 Hun, 109.)

In the other schedules the widow was allowed all the property provided for by the statute, and this \$137.60 was assets and should be administered as such.

The final order of the surrogate is, therefore, reversed, without costs, and the matter is remitted to that court for further action.

All concurred.

Decree reversed, without costs, and the matter remitted to the Surrogate's Court for further action.

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ROSALIE MENDLESON and Others, Appellants, v. HOWARD VAN RENSSELAER, Respondent.

Third Department, March 28, 1907.

**Negligence — collision between motor car and vehicle — when damages excessive — law of the road.**

When in an action to recover damages to a horse and wagon received in a collision with an automobile, it appears that the actual expense of repairing the wagon was twenty-seven dollars and fifteen cents, and that it was in as good or better condition than formerly, testimony that the wagon had shrunk in value from two hundred dollars to fifty dollars is purely fanciful and not worthy of consideration as a basis of damage.

Nor can the damage to the horse be based upon its shrinkage in value as a "family horse" by reason of its becoming nervous in the neighborhood of automobiles by reason of the accident. The defendant is not required to pay the difference in the value of the horse before and after the accident treating it only as a "family horse."

It appeared that the plaintiffs were driving their wagon and approaching the intersection of another road into which they intended to turn. On nearing the intersection they failed to keep to the right thereof as required by subdivision C of section 157 of the Highway Law, but turned to the left side of the road. The defendant, coming from behind, in attempting to pass to the left of the plaintiffs, as required by subdivision B of said act and subdivision 1 of section 4 of the Motor Vehicle Law, struck and injured the horse and wagon. On the question of the defendant's liability,

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*Held*, that the questions as to whether the defendant gave sufficient warning and properly managed his machine in attempting to pass the plaintiffs when nearing the point of intersection of the roads, as well as the contributory negligence of the plaintiffs, were not questions of law but of fact proper for the jury.

COCHRANE, J., dissented, with opinion.

APPEAL by the plaintiffs, Rosalie Mendleson and others, from a judgment of the County Court of Albany county, entered in the office of the clerk of said county on the 13th day of November, 1906, upon an order of said County Court, entered in said clerk's office on the 13th day of November, 1906, reversing a judgment of the City Court of the city of Albany in favor of the plaintiffs and dismissing the complaint.

*Daniel J. Dugan*, for the appellants.

*Frederick Townsend* and *Charles H. F. Reilly*, for the respondent.

KELLOGG, J.:

The plaintiffs' closed carriage was driving along the highway approaching a road intersecting it from the left at an acute angle as they approached it. The defendant with his automobile was traveling in the same direction. Plaintiffs' carriage, in turning from the road into the intersecting road, did not turn to the right of the center of intersection of the two roads, as required by subdivision C of section 157 of the Highway Law (Laws of 1890, chap. 568, as amd. by Laws of 1902, chap. 96), but it followed the usual line of travel and began to turn to the left before it arrived at the intersection of the roads. Just before plaintiffs began to turn to the left, the defendant's automobile turned to the left for the purpose of passing the plaintiffs, and near the point of intersection of the roads a collision took place and plaintiffs' carriage and horse and the defendant's automobile were injured, and each party seeks to recover damages from the other on the ground of negligence.

I think the County Court was justified in reversing the plaintiffs' judgment, but not in dismissing the complaint. Plaintiffs expended for repairing the carriage \$27.25, and it was then evidently in better condition than it was before the accident. They paid \$18 for treating the horse, and the only alleged injury remaining to the horse is that it is timid, restless and difficult to manage when near an automobile. The witness as to the damage and repairs to the car-

riage, while admitting its present condition, swore that before the accident it was worth from \$250 to \$300, and after the accident but \$50 or \$100, because a wagon that had gone through an accident would not sell for as much as it otherwise would. The witness called to show the injury to the horse swore that a family horse was worth \$250; that he had seen this horse in his stable, where it was kept, but he had not seen it outside; that if the horse shied and was uneasy and nervous when around an automobile, as a family horse it was worth but from \$50 to \$75. The evidence as to the amount of damage sustained by the injury to the horse and the carriage is unsatisfactory. As to the carriage, aside from the repairs, the alleged damage was purely fanciful and not worthy of consideration. The defendant was not required to pay the difference in value of the horse before and after the accident, treating it only as a family horse. The damages are excessive and are not founded upon any satisfactory basis, and the judgment of the City Court was properly reversed.

The law of the road, above cited, required the plaintiffs in turning the corner to the left to pass to the right of the center of intersection of the two roads, and subdivision B of that statute required the defendant to pass the plaintiffs upon the left. Subdivision 1 of section 4 of the Motor Vehicle Law (Laws of 1904, chap. 538) recognizes the same rule.

The defendant was familiar with these roads and we may assume knew these statutory provisions. He knew that if the plaintiffs were to turn the corner which they were approaching and he attempted to pass them on the left, as the statute contemplates, that it would probably cause a collision if they were near the intersection at the same time. If there had been no intersecting highway the defendant could have passed in safety, but it is a fair question of fact whether in attempting to pass the plaintiffs in the immediate vicinity and while approaching this intersection from the left he was not guilty of negligence. A delay of a few moments would have enabled him to determine whether the plaintiffs were to turn the corner or not, and it may not be unreasonable to say that there were sufficient opportunities to pass a team without attempting to pass at a point and upon a side where the plaintiffs might desire to turn upon a connecting road. I think, therefore,

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the question as to whether the defendant gave a sufficient warning, and whether he properly managed his machine in attempting to pass the plaintiffs at this particular point, were fair questions of fact.

It is evident that the plaintiffs were not entirely to the right side of the intersecting point of the roads, but it is not clear that that fact had anything to do with the injury. We cannot say as a matter of law that the plaintiffs, in attempting to turn this corner in the usual beaten path when they saw no carriage upon the crossroad approaching them, were guilty of negligence. Perhaps it was reasonable for them to suppose that no one would attempt to pass them from the rear at this corner and thus invite a collision. Plaintiffs' violation of the statute was some evidence of negligence, but all the other facts making up the situation as it then was must be considered in determining whether they acted with due care. If the plaintiffs were negligent it is still a question of fact whether such negligence contributed as a cause to the injury. It was, therefore, a question of fact and not of law whether the plaintiffs were guilty of negligence which contributed as a cause to the injury.

The judgment of the County Court is modified by striking therefrom the part thereof directing a dismissal of the complaint and the award of costs to the appellants, and inserting in lieu thereof that a new trial is ordered before the City Court at a time to be specified, with costs to the defendant to abide the event, and as so modified said judgment is affirmed, with costs to the appellants to abide the event.

All concurred, except COCHRANE, J., who voted for a reversal of the County Court judgment and affirmance of the City Court judgment, with opinion.

COCHRANE, J. (dissenting):

I agree with Mr. Justice KELLOGG that the questions of negligence both of the plaintiffs and defendant were questions of fact. But I also think that not only those questions, but also the question of damages, were well decided by the City Court. The damage to the plaintiffs' wagon was \$27.25 and no more. Only one witness testified as to the amount of damage to the horse. He was acquainted with the horse in question and testified that its reasonable market value before the accident was \$250. He was then

asked a hypothetical question as to the value of a horse displaying such traits and characteristics as the plaintiffs' witnesses testified that the horse in question developed after the accident, and in answer thereto stated that the general market value of such a horse was from \$50 to \$75. He also testified that the reasonable value of the services of the veterinary surgeon was \$18. The testimony of this witness was uncontradicted, although if untrue it was susceptible of contradiction. There was no question raised that plaintiffs' method of proving these damages was incorrect. Assuming, as the City Court was at liberty to assume, the truthfulness of the plaintiffs' witnesses in describing the characteristics of the horse as developed after the accident, I do not see how in fairness to the plaintiffs, it can be said that the judgment is excessive. The testimony of the only witness as to the amount of damages to the horse showed such damage to be not less than \$175, which with the \$18 for veterinary services and \$27.25 for the wagon aggregated the amount of \$220.25 damages awarded the plaintiffs. Defendant was apprised by bill of particulars of the specific items of damages claimed, but offered no evidence in reference thereto. Apparently he was content to permit that branch of the case to go practically by default. A party should not be permitted to suffer one feature of the case to remain unlitigated or only perfunctorily litigated and subsequently complain on appeal of the consequences of his own indifference. The City Court took at its face value the evidence submitted on the question of damages. According to such evidence the damages awarded were not excessive, but within the estimate of the only witness who testified on that subject. The County Court may have believed that the damages awarded were excessive, but had no right nor have we any right to substitute belief for the judgment of the trial court supported as it was by uncontradicted evidence, not inherently improbable.

I think, therefore, that the judgment of the County Court should be reversed and that of the City Court affirmed.

Judgment of the County Court modified as per opinion, and as modified affirmed, with costs to appellants to abide event of a new trial to be had at a time to be specified in the order which, if not agreed upon, to be settled by CHESTER, J.



In the Matter of the Application of the Directors of the ROCHESTER, CORNING, ELMIRA TRACTION COMPANY for an Order Directing the Board of Railroad Commissioners to Issue a Certificate of Public Convenience and a Necessity under Section 59 of the Railroad Law.

Fourth Department, March 6, 1907.

**Railroads — certificate of public convenience and necessity — power of Appellate Division on review of decision of Commissioners.**

An appeal from the Board of Railroad Commissioners refusing a certificate of public convenience and necessity for a proposed street surface railroad comes before the Appellate Division as an original application to be determined upon the record made before the Board of Railroad Commissioners, or upon such further evidence and facts as the court may deem essential to enable it to make a proper determination. It is not merely a review of the decision of a subordinate tribunal which casts upon the petitioners the burden of showing affirmatively that the Commissioners erred in their determination.

The fact that a proposed street surface railroad will parallel an existing steam railroad, and will injuriously affect it by competition, is not necessarily ground for refusing a certificate.

The real question is whether the existing facilities for railroad travel are adequate, and the fact that an existing steam railroad is sufficient to serve through transportation of passengers and freight, does not show that a street surface railroad in the same locality is not a necessity for local transportation.

Evidence taken before commissioners examined, and

*Held*, that a certificate of public convenience and necessity should be granted.

APPLICATION by the directors of the Rochester, Corning, Elmira Traction Company under section 59 of the Railroad Law (Laws of 1890, chap. 565, added by Laws of 1892, chap. 676, and amended by Laws of 1895, chap. 545) for an order directing the Board of Railroad Commissioners of the State of New York to issue a certificate of public convenience and a necessity, said Board having refused to grant such certificate upon application made to it.

*Stephen A. McIntire* [*William A. Sutherland* and *Erwin E. Shutt* of counsel], for the applicants.

In opposition :

*George N. Orcutt* [*George F. Brownell* of counsel], for the Erie Railroad Company.

*Reynolds, Stanchfield & Collin* [*Frederick Collin* of counsel], for Delaware, Lackawanna and Western Railroad Company and others.

*Harris & Harris*, for New York Central and Hudson River Railroad Company.

*Herendeen & Mandeville* [*Edward G. Herendeen* of counsel], for Elmira Water, Light and Railroad Company.

McLENNAN, P. J. :

The Rochester, Corning, Elmira Traction Company was incorporated in July, 1906, for the purpose of constructing and maintaining and operating by electricity a street surface railroad from the city of Rochester in the county of Monroe to the city of Elmira in the county of Chemung, a distance of about 120 miles, passing through a portion of the county of Monroe, also through Livingston and Steuben counties and a portion of Chemung county. Thereafter application was made to the Board of Railroad Commissioners for a certificate of public convenience and a necessity, and after numerous hearings, at which a large amount of testimony was taken, and on December 5, 1906, the Board by a majority vote, two members dissenting, refused to grant such certificate. Thereafter all papers (including a copy of all evidence taken), maps and findings of the Board were duly certified. Thereafter and on the 9th day of January, 1907, by order to show cause returnable on the 28th day of January, 1907, the matter was brought into this court to determine upon the record thus made whether or not a certificate of public convenience and a necessity should issue to the applicant pursuant to section 59 of the Railroad Law. We think the practice adopted to bring the matter to this court was correct. The counsel who appear for the several corporations in opposition to the application insist that this court should regard the application as in the nature of a review of the decision of a subordinate tribunal and not as an original application and, therefore, that the burden rests upon the petitioners to show affirmatively that the Commissioners erred in their determination. We are inclined to follow the rule laid down in *Matter of Wood* (99 App. Div. 334; affd., 181 N. Y. 93), and to hold that the matter comes before this court as

an original application to be determined upon the record made before the Board of Railroad Commissioners if the parties so elect, or upon such further evidence and facts as the court might deem essential in order to enable it to make a proper determination in the premises. However, we deem that question of but little importance in this case, because the entire evidence taken before the Board is before us without objection, and no request was made by either party to submit further proof for our consideration. So that the matter should be decided solely upon the merits as disclosed by all the proceedings had before the Commissioners, including the evidence taken, the decision rendered by them, and the reasons given therefor.

The application for a certificate was denied by the Board of Railroad Commissioners upon the ground, as appears by the opinion of the majority of the Board, that the people residing in the territory through which it is proposed to construct and operate the applicant's railroad are now reasonably well supplied with transportation facilities by means of the operation of the steam railroads and other electric roads which traverse practically the same territory, each of which is represented by counsel in opposition to this application; and especially because such railroad companies have already undertaken or are about to undertake to furnish additional facilities by electrifying some of such lines and otherwise. It would not be useful to describe in detail the precise location of the proposed railroad, or just the relation it would sustain as to location to the other roads mentioned. Suffice it to say that it practically parallels the Erie railroad or some of its branches for substantially its entire length and the roads of the other companies appearing in opposition, to a considerable extent, and it is established beyond contradiction that such proposed new road if constructed and operated would injuriously affect such opposing companies. That being so, if the people residing in the territory in question are now reasonably well accommodated as to transportation facilities, and if such is the fact established by a fair interpretation of the evidence, the Board properly refused a certificate.

In determining what conclusion this court should reach in the premises we are of the opinion that great weight should be given to the decision reached by the Board. (*People ex rel. New York*

*City & Westchester R. Co. v Comrs.*, 81 App. Div. 241.) It, however, becomes the duty of this court to examine the evidence and to determine whether public convenience and necessity require the construction and operation of the proposed road. While the fact that the territory is now occupied by other railroads should properly be considered, it should in no sense be regarded as controlling. Practically every suburban electric railroad authorized in this State paralleled an existing steam railroad. The larger percentage of the population settled upon the lines of such railroads, and at almost every station a hamlet, village or city had grown up, and yet that has not been regarded as a valid objection to the construction of a street surface railroad along such route through such hamlets, villages and cities. Probably no section of our country is better supplied with steam railroad facilities than is central New York by the New York Central railroad from Albany to Buffalo. Yet trolley lines have been authorized and are nearly completed which will furnish a continuous line between said points. So, practically, all the branches of the New York Central system have been paralleled by trolley lines

In such cases the question was not whether the through transportation facilities between termini or even between the larger cities were adequate, but whether the people living along the line of such steam railroad and between its stations required additional facilities. Indeed, between points a long distance apart the trolley roads do not compete with the steam roads. The passengers and freight which the former carry are as a rule carried to the stations of the latter. In all essential respects the two serve separate purposes, each equally necessary to the convenience of the public. This policy has been adopted by the Board of Railroad Commissioners so uniformly that it may be regarded as the settled policy of the State, to wit, to permit steam railroads to be paralleled by trolley roads, however ample the facilities furnished for travel by such steam roads between terminal points or between principal stations, and so notwithstanding such trolley road may reduce the earnings of the steam road. The primary purpose of a trolley road is to convey people directly from their homes to the nearby villages or cities or *vice versa*.

In the case at bar the situation is essentially no different than as

above indicated. The facilities for through passenger and freight transportation between Rochester and Elmira and between Elmira and Corning are reasonably adequate, and it would not be claimed that another through line is necessary; but the evidence demonstrates that the facilities for local traffic are wholly inadequate upon the entire route, except between Corning and Elmira; that trains are run infrequently; that the stations are comparatively long distances apart and that a considerable portion of the territory is not accommodated by the existing railroads, which will be no more closely paralleled by the proposed railroad than such railroads usually have been by such construction in other parts of the State. It is said that along a considerable part of the route the country is sparsely settled and that a sufficient patronage cannot reasonably be expected to justify the expenditure necessary to construct and operate the proposed road. Experience has demonstrated and additional transportation facilities have greatly increased the use of such facilities, and the applicant directors apparently in good faith assert their willingness and ability to obtain the necessary capital to construct and equip the road. The fact that the Erie Railroad Company proposes to electrify its road does not materially alter the proposition. That does not mean that it is to be converted into a street surface railroad, but rather that the motive power for the transportation of passengers will be changed from steam to electricity. Regular trains, passenger and freight, will be run then as now, must be run on schedule time and will only stop to take on or let off passengers at the regular stations. The passenger trains may run more frequently, but with all the changes suggested the people along the route will not have such facilities as is understood will be afforded by a street surface railroad. The evidence shows that the population to whom the line of the proposed road would be reasonably accessible averages between 400 and 500 per mile, not including the population of either Rochester or Elmira, and the evidence very conclusively shows that such population have at the present time very inadequate transportation facilities along the greater part of such route. That fact becomes apparent upon examination of the time tables of the existing roads. As before suggested, it does not necessarily follow that the present facilities for through traffic between the termini are not reasonably adequate,

but it can hardly be contended that the local demand had been reasonably met. And it is established beyond doubt that with additional accommodations the demand would be largely increased. In addition it is true that considerable portions of the territory through which it is proposed to operate the road in question have practically no railroad facilities. We think the evidence fails to show that such conditions will be materially changed even after all the improvements which are under way or are contemplated by the opposing companies have been made. When all is completed, practically none of the facilities offered by a street surface railroad, if properly operated, would be afforded to the inhabitants of the territory in question.

Whether or not the proposed road is a public convenience and a necessity is and must be a matter of opinion. Absolutely accurate demonstration is impossible. So that after all we must look for its solution in the opinion of witnesses. A very large number of people residing in close proximity to the route of the proposed railroad and who are apparently familiar with the locality, the existing conditions and the needs of the inhabitants, state unqualifiedly under oath that in their opinion the construction and operation of the proposed road is a public convenience and a necessity. Such opinions are fortified by reasons which appeal to us as being forceful, viz., the infrequency of trains upon the steam roads, the long distances which it is necessary to travel to reach the stations on such roads, and that with increased facilities the travel will increase. No witness residing along the proposed route between Rochester and Big Flats, a distance of 10½ miles, was called who expressed a contrary opinion. Indeed, it may almost be said that the people residing in the territory affected are practically unanimous in the opinion that the road is a public convenience and a necessity. Certain experts called by the opposing railroads, men apparently of the highest character and of large experience, testify that in their opinion said road would not be a public convenience and a necessity, and they fully state their reasons for such conclusion. An expert called by the applicant expresses the contrary view.

We have examined all the evidence with very great care and we are forced to the conclusion that the weight of it is largely in favor of the applicant's contention, and that a certificate of public con-

venience and a necessity should be granted. We think that any other result would be at variance with the policy long adopted by this State, as evidenced by a long line of decisions made by the Board of Railroad Commissioners which have been approved by the courts, several of which are referred to in the dissenting opinion of two members of the Board, which is made a part of the record in this case. From Albany to Buffalo street surface railroad companies have been authorized to construct their roads within sight of the railroad of the New York Central for practically the entire distance, although upon such road passenger trains are run in each direction hourly or oftener. It was not considered an objection that such new road would reduce the revenue of the old, or that it had ample facilities to accommodate a much larger traffic. We fail to see how a distinction can properly be made as between such cases and the one at bar.

We more readily reach the conclusion above indicated because of the reasons set forth in the dissenting opinion of the Commissioners. Each of those dissenting had the same technical knowledge, was at least equally familiar with the conditions and with the needs of the people residing in the territory affected, with either of those who joined in the opinion filed by the majority of the Board.

Upon the whole evidence, and after giving full consideration to the many suggestions of able counsel, we conclude that the order applied for directing the Board of Railroad Commissioners to issue a certificate of public convenience and a necessity should be granted, but without costs.

All concurred.

Application granted, without costs.

FRANK A. RAYMOND, Appellant, Impleaded with RICHARD WHITE and Others, Plaintiffs, v. MAYNARD N. CLEMENT, as State Commissioner of Excise, and Others, Respondents.

Fourth Department, March 6, 1907.

**Intoxicating liquors — local option — resubmission of question after illegal vote — court has no power to order issuance of liquor tax certificate.**

If a town vote on local option is illegal and of no effect the parties seeking to invalidate the election must find their redress under section 16 of the Liquor Tax Law, providing that if the questions be not properly submitted at the town meeting they shall be again submitted at a special meeting.

The only way in which a party aggrieved can be relieved from the effect of an improper submission of the excise questions is by application to have the submission declared improper and illegal and for a resubmission of the questions to the electors of the town. A court of equity has no power on declaring an election void to order the county treasurer to issue liquor tax certificates.

APPEAL by the plaintiff, Frank A. Raymond, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Cattaraugus on the 6th day of August, 1906, upon the decision of the court, rendered after a trial at the Cattaraugus Special Term, dismissing the complaint upon the merits.

The action was commenced in April, 1906, to have it adjudged that an attempted submission of the excise questions, so called, to the electors of the defendant town at its biennial town meeting, held on the 7th day of November, 1905, and the statement of the votes cast thereat upon such questions as certified and filed by the board of inspectors, were illegal and of no effect; and to compel the defendant Straight, as county treasurer, to issue a liquor tax certificate to each of the plaintiffs precisely as if such submission had not been attempted or such statement of the result of such submission had not been made and filed.

*Alexander Wentworth* [*Carey D. Davie* of counsel], for the appellant.

*Royal R. Scott*, for the respondents Clement and Straight.

*James G. Johnson*, for the respondent town of Randolph.



McLENNAN, P. J. :

The facts are not in dispute and are fully stated in the findings of the learned trial court, to which no exception was taken.

So far as material the facts are that during all the times in question the plaintiffs were severally engaged in keeping hotels in the town of Randolph in the county of Cattaraugus, N. Y. At the general election held in and for said town in November, 1903, the four excise questions, so called, were duly submitted to the electors of said town, and a majority voted in the affirmative upon the fourth of said questions, which in effect permitted liquor to be sold by hotelkeepers in said town. Thereupon liquor tax certificates were issued to each of the plaintiffs and they expended considerable sums of money in preparing to carry on such traffic, which will be practically lost unless they are permitted to continue the same.

At least twenty days before the time appointed for holding the biennial town meeting of the town of Randolph in the year 1905, a petition in proper form, signed and acknowledged by the requisite number of electors, was filed with the town clerk and in all respects in accordance with the provisions of the statute in that regard, requesting that the excise questions be submitted to the electors of said town at such election. Pursuant to the request of such petition there was an attempted submission of such questions; a considerable number of electors voted thereon; the board of inspectors canvassed the votes so cast and made and filed a statement of the result, in form and in all respects as required by law, which return or statement declared that a majority of the votes cast were in the negative upon each of said questions, and, therefore, upon its face such return constituted a bar such as to prevent the county treasurer from issuing liquor tax certificates to the plaintiffs or either of them or to any hotelkeepers in said town of Randolph.

It appears, however, without contradiction, that because of acts or omissions on the part of the officers of said town and of the board of inspectors, done or omitted subsequent to the filing of the petition as aforesaid, and none of which appeared upon the face of the return of the inspectors made and filed as aforesaid, the said excise questions were not properly submitted, and that the result as declared was false and erroneous. Concededly the plaintiffs were

aggrieved by the result thus falsely and erroneously declared by the board of inspectors and they are entitled to be relieved from the effect thereof.

The only question presented by this appeal is whether the plaintiffs can obtain relief in an action in equity, or must they seek redress in the manner provided by section 16 of the Liquor Tax Law? Unless the statutory provisions furnish not only a remedy but the exclusive means of righting the wrong complained of unquestionably a court of equity would have jurisdiction in the premises. The cases cited by counsel for appellants fully sustain that proposition. Those authorities also hold in effect that in order to oust a court of equity of jurisdiction of a matter which it formerly possessed by statutory enactment, the terms of the statute must be explicit to that effect, or it must result by necessary implication. In the case at bar the statute does not in words say that its provisions shall furnish the exclusive remedy by which wrongs such as are complained of by the appellants may be remedied, but we think that by necessary implication such is the meaning of the statute.

The Liquor Tax Law provides a full and complete system of local option for towns. Its provisions, so far as it is important to consider, are as follows:

“§ 16. Local option to determine whether liquors shall be sold under the provisions of this act.—In order to ascertain the will of the qualified electors of each town, the following questions shall be submitted at each biennial town meeting hereafter held in any town in this State, provided the electors of the town to the number of ten per centum of the votes cast at the next preceding general election shall request such submission by written petition, signed and acknowledged by such electors before a notary public or other officer authorized to take acknowledgments or administer oaths, which petition shall be filed not less than twenty days before such town meeting with the town clerk of the town:”

The fourth question to be submitted under this provision is in effect, Shall any person be authorized to sell liquor in connection with the business of keeping a hotel? The section then provides what shall be done by the town officers and others charged with the duty of conducting the election, and then provides: “As soon as the town meeting or election shall be held, a return of the votes

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cast and counted shall be made as provided by law, and if the majority of the votes shall be in the negative, or if the number of votes cast for and against shall be equal on either of such questions, no \* \* \* person shall thereafter so traffic in liquors or apply for or receive a liquor tax certificate. \* \* \* If for any reason except the failure to file any petition therefor, the four propositions provided to be submitted herein to the electors of a town shall not have been properly submitted at such biennial town meeting, such proposition shall be submitted at a special town meeting duly called."

The statute then prescribes the manner of holding such special town meeting, the canvassing, certifying and returning of the votes cast thereat, and then provides that no liquor tax certificate shall be issued authorizing the traffic in liquor in said town when a majority of the votes cast have been in the negative upon such excise questions. (Laws of 1896, chap. 112, § 16, as amd. by Laws of 1905, chap. 680.)

It would thus seem clear that it was the purpose of the Legislature to permit the electors of a town to determine whether or not liquors should be sold within its boundaries, and that the method prescribed for ascertaining their wishes in that regard was to submit the excise questions, so called, to such electors. To bring about such a submission under the statute, the electors could only sign, acknowledge and file with the town clerk in the manner required by law a petition requesting the submission to the electors of the excise questions. If the result of such election as declared by the inspectors was in accordance perchance with the desires of the petitioners, it would seem incongruous that they should be compelled to attack its validity in order to obtain the result desired by them, to wit, the prohibition of the sale of liquors in said town. But, aside from that, the scheme of the statute clearly was to provide for local option notwithstanding the excise questions were not properly submitted at any election. In such case the statute expressly provides for a resubmission of the questions to the electors. Now, if a court of equity has jurisdiction to determine that such questions were improperly submitted and that the result of such submission as declared had no binding force or effect and, therefore, compel the issuance of liquor tax certificates precisely as if such submission had not been attempted, then the local option feature of the statute

would practically be annulled. As we have seen, the statute provides that a proper petition having been filed by the requisite number of electors the electors of the town shall determine whether or not liquor shall be sold, and in case such questions are improperly submitted, a special town meeting shall be held at the instance of any party aggrieved to settle the question.

If the contention of appellants is correct, in case error or mistake is made by those charged with the conduct of such submission, a court of equity may declare such mistakes or errors to be fatal to such submission and practically decree that liquor may be sold in said town irrespective of the wishes of a majority of the electors therein, and if the contention of the appellants is correct another very strange situation might arise. Those opposed to the sale of liquors in any town, feeling possibly that the submission of the excise questions as attempted to be made was illegal or irregular, might apply under the provisions of the statute for a resubmission of the questions to the electors, and upon such resubmission the vote might be adverse to the sale of liquor in said town, and yet a court of equity might declare in an action like this, either immediately before or after the result of such vote was declared, that the former submission having been irregular the county treasurer should be compelled to issue liquor tax certificates authorizing the sale of liquor in said town.

Under such conditions it may be seen that two judgments absolutely conflicting might be rendered. By the provisions of the statute under the Liquor Tax Law by "an order of the Supreme or County Court or a justice or judge thereof" a submission of the excise questions may be declared to have been improperly submitted and a special town meeting ordered to again vote upon such questions. If appellants' contention is sound a court of equity might determine that such submission was valid and binding and render judgment absolutely in conflict with that rendered by the other tribunal. Such incongruous situation could not have been contemplated by the Legislature, but rather it was intended that the Liquor Tax Law should provide in and of itself the means by which the electors of any town might determine whether or not intoxicating liquors should be sold therein, and that if such will was erroneously or improperly declared at any election the only means of correcting

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the error was by a resubmission of the questions to the electors at a special town meeting called and conducted in the manner prescribed by the statute.

Independent of the logic of the situation we think this court is bound by its former decision upon the question. In *Matter of O'Hara* (63 App. Div. 512) Mr. Justice WILLIAMS, writing for the court, said: "The remedy for a failure to properly submit the question at the town election was the resubmission thereof at a special town meeting duly called." (See, also, *Matter of Town of La Fayette*, 105 App. Div. 25; *People ex rel. Caffrey v. Mosso*, 30 Misc. Rep. 164.)

In the *O'Hara* case the precise question was not involved, and it may be suggested that the language quoted is *dictum* so far as the case at bar is concerned. However, we now decide that the only way in which a party aggrieved can be relieved from the effect of an improper submission of the excise questions is by application to have such submission declared improper and illegal and for a resubmission of the questions to the electors of the town; that the remedy prescribed by the statute is exclusive and that the trial court upon the conceded facts had no jurisdiction in the premises.

It follows that the judgment appealed from should be affirmed, with costs.

All concurred; KRUSE, J., in result only.

Judgment affirmed, with costs.

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In the Matter of the Final Settlement of the Accounts of TIMOTHY BRAY, as Executor, etc., of DAVID WHITE, Deceased.

PATSEY WHITE, Appellant; TIMOTHY BRAY, as Executor, etc., and Others, Respondents.

Fourth Department, March 6, 1907.

**Will—real property—when power of alienation not suspended.**

The power of alienation of real property is suspended only when there are no persons in being by whom an absolute fee in possession can be conveyed. Hence, a devise of the use of lands to the testator's brother "until the last of my children shall become of age," when the property shall be sold and divided

equally between the children, does not suspend the power of alienation. The children take vested remainders, and they, together with the owner of the precedent estate, may by joining in a conveyance give an absolute fee in possession.

APPEAL by Patsey White from so much of a decree of the Surrogate's Court of the county of Niagara, entered in said Surrogate's Court on the 9th day of October, 1906, as directs the payment of certain sums to the guardians of the infant children of the testator.

*S. E. Filkins*, for the appellant.

*George D. Judson* and *George F. Thompson*, for the respondents.

SPRING, J. :

David White, of the county of Niagara, died October 29, 1902 leaving a last will and testament. In the first item, after a legacy to the wife of his brother Patsey, he provided : " I give and bequeath to my brother, Patsey White, the use of my house and seventeen acres of land lying on the extension of Mill Street, in the town of Royalton, until the last of my children shall become of age. Then the property shall be sold and divided equally between my children, share and share alike."

The testator left four minor children, his only heirs at law. The land devised was sold by proceedings in the Surrogate's Court to pay the debts of the testator, and after paying the same there was a surplus which came into the hands of the executor and was included among the assets for distribution upon the judicial settlement of his account. The surrogate in construing the provision of the will quoted for the purpose of decreeing distribution has determined that the division of the property of the testator is suspended during the lives of the four minor children, which would be an unlawful suspension, and by his decree has directed distribution of this surplus to the guardians of the respective infants.

We cannot concur in his decision. The testator did not create any trust in his brother. He only permitted him to enjoy the use of the property for a designated time. The primary scheme of the will, apparently, was to provide for his children, and he accomplished that purpose by vesting the title in them absolutely, but not to be enjoyed in possession until the youngest child attained his

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majority. They held a future estate with a precedent estate created at the same time. (Real Prop. Law [Laws of 1896, chap. 547], § 27.)

There was no suspension of the power of alienation. "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed." (Real Prop. Law, § 32.) There are persons in being who can convey the property devised by the testator. Patsey White, who had the use, and the children in whom the fee was vested, could pass an indefeasible title at any time by joining in a conveyance of the premises, and immediate possession of the premises could be given. The remainder was not contingent, but vested; and the construction which permits this will be upheld where it can be consistently done. (*Hersee v. Simpson*, 154 N. Y. 496; *Miller v. Gilbert*, 144 id. 68.)

If one of the children died his title would pass by descent to his heirs at law, even though the date of possession was not reached.

The distinction between this case and others which have been held to offend against the Statute of Perpetuities is that in that class of cases a trust was created and the estate did not vest, as in *Haynes v. Sherman* (117 N. Y. 433), while here the devisees took the title immediately upon the death of their devisor, but the enjoyment of it was postponed.

The decree, so far as appealed from, should be reversed, with costs to appellant payable from the fund, and the proceeding remitted to the Surrogate's Court of Niagara county to correct its decree in compliance with this opinion.

All concurred.

Decree, so far as appealed from, reversed, with costs to the appellant payable out of the fund, and proceeding remitted to the Surrogate's Court of Niagara county to correct its decree in compliance with opinion.

JULIA MIKOS, as Administratrix, etc., of JOHN MIKOS, Deceased  
also KNOWN as JOHN WEAKUSH, Respondent, v. THE NEW YORK  
CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Fourth Department, March 6, 1907.

**Negligence — Employers' Liability Act — injury to employee removing  
ashes from locomotive.**

A person placed in charge of employees cleaning ashes from locomotives in the absence of the regular superintendent or foreman, and directing the work, is acting as a superintendent within the meaning of the Employers' Liability Act. In an action to recover for the death of the plaintiff's intestate it appeared that the intestate was employed by the defendant to clean ashes from locomotives in an ash pit over which the locomotives were run for that purpose. While so engaged, an employee known as a "hostler," without other warning than ringing the bell, started two locomotives under which the intestate was working, whereby the intestate was run over and killed. There was evidence that the "hostler" had been directed by the acting superintendent to take the locomotives from the pit as soon as possible, and was told that they were dumped and ready to be removed.

*Held*, that the "hostler" was justified in relying on the statement of the superintendent that the locomotives were ready to be moved, and that the defendant could not be heard to say that its orders should be disregarded or its information treated as unreliable, and that a verdict for the plaintiff was warranted.

MCLENNAN, P. J., dissented, with opinion.

APPEAL by the defendant, the New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 21st day of August, 1905, upon the verdict of a jury for \$7,233.33, and also from an order entered in said clerk's office on the 21st day of August, 1905, denying the defendant's motion for a new trial made upon the minutes.

*Charles A. Pooley*, for the appellant.

*H. J. Swift* and *Frank E. Wade*, for the respondent.

SPRING, J.:

The complaint sets out and the proof tended to establish a cause of action within the Employers' Liability Act (Laws of 1902, chap. 600). The plaintiff's intestate was in the employ of the defendant engaged in cleaning the engines from ashes in an ashpit provided



for that purpose. This ashpit was connected with the defendant's yards at East Buffalo, was constructed of cement and adaptable for the purpose intended. It was the practice to run cars, from which the ashes needed dumping, on tracks over these pits, and men crawled under the engines and scraped out the ashes with a hoe, and plaintiff's intestate had been doing that work for some time.

On the 21st day of November, 1903, at about noon an engineer of the defendant ran on one of these tracks two engines coupled together, the first one a live engine, and the one in the rear a dead crippled engine. A man named Illman was in charge of this branch of the business on that day in the absence of the regular superintendent or foreman, and he always acted in that capacity when the superintendent was not present. Illman had control of the men, directed them in the work of handling these engines, decided whether they should be dumped, when and where to be removed, and within his sphere was in supreme command. He was, therefore, acting as superintendent within the meaning of the Employers' Liability Act. (*McHugh v. Manhattan R. Co.*, 179 N. Y. 378; *Faith v. N. Y. C. & H. R. R. Co.*, 109 App. Div. 222; *affd.*, 185 N. Y. 556; *McBride v. New York Tunnel Co.*, 101 App. Div. 448.)

Illman marked these engines to be dumped and it was expected this work would be done during the noon hour. The plaintiff's intestate was under the rear engine, as was necessary, hoeing out the ashes into the pit provided for them, when the engines were set in motion by Chamberlain, a hostler, without sufficient warning to Mikos, the decedent, and he was run over and killed. The proof does not disclose precisely how the accident occurred. The bell of the engine was rung just as it started, and it is a fair inference from the evidence that he attempted to escape from his perilous situation when he was crushed with the drivewheels of the engine. Without detailing the facts and inferences permissible, suffice it to say we think the jury had a right to acquit Mikos of any fault which would prevent the plaintiff recovering in this action.

Chamberlain during the noon hour was eating his luncheon in a shanty twenty or twenty-five feet from the end of the ashpit, and his business was to move engines from the ashpit when ordered to do so. When he had nearly finished his luncheon, Illman came

to the shanty and directed him to remove these two engines. The nub of the litigation is over this direction. Chamberlain was not sworn and was out of the State at the time of the trial. Brown, a hostler employed by the defendant, was in the shanty with Chamberlain and testified that Illman came there and "told Chamberlain to take them two engines on that pit over to the coal chute; they were dumped out and the second engine was disabled; they were both coupled together; take them before they died and get them in the house so as to make room for the switch engines. \* \* \* Take them; they are ready. \* \* \* The first one was dumped out and the second one disabled. \* \* \* Take them as soon as possible before they die \* \* \* so as to make room for the switch engines coming in there at the dinner hour."

Illman disagreed with this version and said he simply told Chamberlain "when those engines are ready, keep them coupled together and take them off."

The court in submitting the discrepancy in this testimony to the jury and its effect as the pivotal question in the case said: "Now, gentlemen, if it (the injury to the plaintiff's intestate) did occur solely through the negligence of Chamberlain, then the plaintiff is not entitled to recover. But if Chamberlain was negligent, and Illman was also negligent, and the accident would not have happened but for the negligence of Illman in respect to the matter to which I have called your attention, then for that act of negligence upon the part of Illman in the respect to which I have called your attention the defendant is responsible, for at this time he was exercising acts of superintendence as I view the case, and under the law the defendant is liable for such negligence."

The only rule in any way pertinent to this situation was one providing, "The engine bell must be rung when the engine is about to move." That rule is of little significance in this case, for Chamberlain rang the bell as his engine started. The evidence showed that it was almost the invariable practice for the engineer, before taking his engine from the ashpit, to look under the engine and ascertain if the hoer had finished the dumping of the ashes, and, if not, to give him personal warning. It is patent that some warning of this kind must be essential to the safety of the men under the engine, rather than to depend for warning upon the ringing of the bell or

by sounding the whistle just before starting the engine, and the necessity is more pressing when two engines are coupled together and the workman is under the rear engine.

The crucial question is, therefore, whether Chamberlain was justified in departing from the usual practice because Illman told him the engines were dumped and were ready to be taken out. Illman was the man who represented the defendant. For the purpose of regulating the movements of Chamberlain in handling and removing these engines he was the defendant. Chamberlain knew that Illman was his superior, and that his special domain was these ash-pits and the control of these engines. Illman came directly from the engines. The customary time for dumping them was an hour, and that time had already elapsed. He testified: "We have strict orders not to delay them any more than we can possibly help; to get them off as quickly as possible." With this injunction in mind he gave the direction to Chamberlain.

We think the hostler had a right to rely on these statements of Illman, that the engines had been "dumped" and were "ready." It is the same as if the defendant, coming directly from the engines, advised the engineer that they had been cleaned and were ready to be removed. They were put in there for the sole purpose of being cleaned under the direction of Illman, and if he told Chamberlain that the work had been done and they were ready to be removed, the jury certainly had a right to find that Chamberlain was excused from investigating on his own account. He had been instructed by the foreman "to be careful to look around to see it was clear, ring the bell and also blow the whistle." Illman, his immediate superior, in effect told him there was no need of spending the time to look under the engines or make any personal inspection, for they were ready to be taken out. Illman assumed to possess knowledge of the cleaning of the engines and their readiness to be removed.

It certainly would be carrying the rule beyond reason to hold that where the defendant has assumed to say to his servant that every danger has been removed, and to do certain work in reliance upon that statement, for the defendant to be absolved from liability because the servant had no right to accept the statement, but must act precisely as if it had not been made. Illman, the representative of the defendant, imparted the information for the benefit of Cham-

berlain and gave instructions, expecting them to be obeyed. Chamberlain had a right to accept the facts stated and obey the directions, and the defendant, who interfered and authorized the departure from the prevailing practice, cannot be heard to say its orders should be disregarded or its information treated as unreliable.

Chamberlain finished his luncheon in about five minutes, ran out the engines without investigating at all, and, as a result of this omission, the plaintiff's intestate was killed, and the jury were authorized to impute the blame to the defendant.

The judgment and order should be affirmed, with costs.

All concurred, except McLENNAN, P. J., who dissented in an opinion, and KRUSE, J., not sitting.

McLENNAN, P. J. (dissenting):

The material facts are not in dispute. At about noon on the 21st day of November, 1903, plaintiff's intestate was in defendant's employ, engaged in cleaning ashes from an engine standing over an ashpit in the defendant's yard in the city of Buffalo. In order to perform such service it was necessary to go into the pit and under the engines to be cleaned. While thus engaged, the engine under which he was at work was moved, and in attempting to escape he was run over and injured in such manner that he died soon after. The deceased had been in defendant's employ for a considerable time prior to the accident and was entirely familiar with the method of doing the work in which he was engaged. Concededly, when it was necessary to dump or clean the ashes from an engine it was run over the ashpit by a "hostler," was marked "dump" by the superintendent or person in charge, and other employees then went under it to hoe out the ashes into the pit. When that was done a hostler took the engine from the pit. It was the universal custom in defendant's yard, and the hostlers had been instructed not to move an engine from the ashpit until they had examined to see if any one was under the engine, then to sound the whistle and ring the bell before starting the same, and such instructions had been given to the hostler who moved the engine in question.

At the time in question two engines had been placed upon the pit. One was a live engine, the other crippled; both coupled together, and only capable of being moved by power from the live

engine. These engines had been upon the pit for about an hour, and a Mr. Illman, who was acting as superintendent in respect to the movement of the same, went into a shanty about twenty-five or thirty feet from the ashpit, where a Mr. Chamberlain and a Mr. Brown, who were hostlers, were eating their dinner, and directed Chamberlain to take the two engines from the pit, stating, as the jury had a right to find, that they had been dumped and were ready to be moved. Illman then left the hostlers in the shanty eating their dinner, got upon his own engine and went away. After five or six minutes, when he had finished his dinner, Chamberlain went to the pit to remove the two engines. He made no examination or observation to see whether or not any one was under the engines or in the ashpit, but got into the cab, gave a blast of the whistle, rung the bell and moved the engines, with the result that the plaintiff's intestate in attempting to get out of the pit was crushed under the wheels and killed.

We think the evidence was of such character as to justify the jury in finding that the deceased was free from contributory negligence. The only question left to the jury by the trial court as to defendant's negligence was whether or not Illman, who was then acting as superintendent, was guilty of negligence in stating to Chamberlain when he directed him to take the two engines from the ashpit that they had been dumped and were ready.

It must be conceded that if the accident occurred solely because of the negligence of Chamberlain the plaintiff cannot recover, because he was a coemployee with the deceased, and the trial court so charged. It is equally clear that if it resulted because of the negligence of Illman or would not have occurred except for his negligence, the defendant is liable, because at the time he was acting as superintendent, and under the Employers' Liability Act, his negligence was the negligence of the master. So that the only question presented by this appeal is whether or not it was permissible for the jury to find that Illman was negligent because he directed Chamberlain to take the engines from the ashpit and stated to him at the time in substance that they had been dumped and were ready to be moved. If Chamberlain had followed the express instructions given to him by the defendant and the custom which had been universally adopted in removing engines from the ashpit

the accident would not have happened, for then he would have discovered that plaintiff's intestate was in the pit and would not have moved the engines.

Could Illman have anticipated that his directions and statement would be interpreted by Chamberlain to mean that the engines in question might be moved in violation of the express directions given to him by the defendant and in violation of the custom adopted for doing such work; that he was thereby relieved from making any examination to ascertain whether any one was under the engines before moving the same? If Illman had given the direction and made the statement attributed to him with the engines in his view or under such circumstances that his order was to be carried out under his observation or immediate direction, another question would be presented. But here the superintendent found the hostler eating his dinner, entirely away from the engines, doing no act in connection with them. Under these circumstances he gave the order directing their removal, stating in substance that they were ready to be removed, and also that it was desirable that they should be moved as speedily as possible. We think such direction and statement should not be construed to mean that Chamberlain was authorized to move such engines, except in the usual manner and in accordance with the directions which had been given him for the performance of such work. After the directions were given by Illman Chamberlain waited five or six minutes before attempting to move the engines. During that time any employee might have gone into the pit, which only emphasizes the suggestion that the statement made five or six minutes before, "the engines are ready," could not be interpreted as an assurance on the part of Illman that no one was in the pit, and, therefore, that the hostler was relieved from making an investigation in that regard. Indeed, it very conclusively appears that Chamberlain did not so interpret the statement, for he sounded the whistle and rung the bell, all of which was unnecessary except for the purpose of warning any person who might be in the pit underneath. The rules in force upon practically all railroads require that before a standing engine is put in motion the bell shall be rung. If a superintendent should give an order directing that an engine standing not in his view should be moved and should state that everything was ready for its

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starting, could such an order and statement be interpreted by the engineer to mean that he was not required to ring the bell, that it was permissible for him to violate the express rules of the company in that regard?

In the case at bar if Chamberlain was authorized by reason of what was said by Illman to violate the express instructions which required him to look under an engine before moving it from the ashpit he was equally authorized to omit sounding the whistle or ringing the bell.

We think the order given and statement made by the superintendent did not authorize the hostler to move the engines in question except in the ordinary way and after having taken the precautions imposed upon him by the express instructions of the defendant for the protection of his coemployees, viz., before moving an engine from the ashpit to see that no one was underneath and then to sound the whistle and ring the bell; that the accident in question resulted solely because of the negligence of Chamberlain in failing to obey such instructions, and that for such negligence the defendant is not liable.

Having reached the conclusion that the evidence fails to establish that the superintendent, Illman, was guilty of negligence which caused or in any manner contributed to the accident, it is unnecessary to consider any other of the questions raised by this appeal.

It follows that the judgment and order appealed from should be reversed and a new trial granted, with costs to the appellant to abide event.

Judgment and order affirmed, with costs.

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JAY ROBINSON, Respondent, v. CROSSTOWN STREET RAILWAY  
COMPANY OF BUFFALO, Appellant.

Fourth Department, March 6, 1907.

**Negligence—collision between vehicle and trolley car coming from  
behind—contributory negligence.**

Action to recover for personal injuries.

The plaintiff was driving a load of hay, the wheels of his vehicle running on the right-hand track of the defendant's electric road. A trolley car coming from behind sounded its bell when 500 feet distant from the plaintiff as a warning

to leave the track. The plaintiff turned his team to the left so that the car could pass him, but, upon the car slowing up, immediately turned to the right for the purpose of crossing the track when he was struck and injured. It was shown that the motorman used every endeavor to stop the car after the plaintiff made the second turn and that the plaintiff had not looked behind from the time when he first saw the car 500 feet away.

*Held*, that it was error to refuse to charge that if the plaintiff drove so as to be free from the car and then turned toward the track without any precaution, he was negligent and could not recover.

WILLIAMS, J., dissented.

APPEAL by the defendant, the Crosstown Street Railway Company of Buffalo, from an order of the County Court of Erie county, entered in the office of the clerk of said county on the 17th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes, a verdict having been rendered by the jury in favor of the plaintiff for \$200.

*Charles B. Sears*, for the appellant.

*Philip A. Laing*, for the respondent.

SPRING, J. :

The plaintiff on the 21st day of March, 1904, was struck by one of defendant's trolley cars on Abbott road, in the city of Buffalo, and was injured, and brings this action to recover for such injuries.

Abbott road runs in an easterly and westerly direction, and two tracks of the defendant are operated along it, the outside rail of either track being about nine feet from the curb. The plaintiff was driving east with a large load of hay on a hayrack drawn by two horses, his wheels running on the defendant's southerly or right-hand track. The defendant's car was following him on the same track and, when near Abbey street, about 500 feet away, the motorman began sounding the gong, to warn the plaintiff of the approach of the car so that he might get off the track. The plaintiff intended to have his hay weighed on a pair of hay scales which was in an alleyway at his right hand as he was going east, and he turned his team to the left, clearing the track on which he had been traveling, sufficiently so that the car could pass him, then turned to the right for the purpose of crossing the track and reaching the hay scales. He had nearly crossed the track when his wagon was hit by the



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defendant's car. The car contained quite a number of passengers and the proof shows clearly that the motorman sounded the gong back 500 feet or more and continued to do so until the plaintiff had cleared the track sufficiently to enable the car to pass. The motorman also slowed down his car, but after the wagon had got over the track he accelerated its speed, and when the horses in their turn again got on the east-bound track the motorman reversed the lever and endeavored to stop the car, but claimed he was unable to do so.

The evidence is very slight to show any negligence on the part of the defendant. Several witnesses, among them passengers who were on the car, testified to the warning signal, to the slowing down of the car and to the fact that the load of hay had cleared the track three or four feet, so that there was ample room for the car to pass before the motorman increased its speed. Two or three witnesses also testified to the attempt of the motorman to stop the car after the turn had been made.

The motorman had a right to assume that the plaintiff left the track in response to the warning which had been given and for the purpose of allowing the car to pass.

But, if we assume that the motorman might have stopped his car after the horses had reached the track in their turn, I think that the plaintiff was guilty of contributory negligence as matter of law.

He testified that he looked back when he started to make the turn in order to reach the hay scales and saw the car approaching about 500 feet away, and he did not look again at all. His version is as follows: "The first I knew that a car was coming was when I started to turn out of their right-hand track, I looked back, I saw a car way back; that was when I began to turn to the left. The car was back near Abbey Street. I have measured, or assisted in measuring, that distance from Abbey Street to the scales; the distance is about 500 feet. This was about two o'clock in the afternoon. It was a fair day. *After I looked back and saw the car near Abbey Street, I did not see the car again until I was struck.*"

Further, on cross-examination, he says: "I did not give the car any further thought." And again: "On this occasion I raised up once and saw that car." And he further testified that he was in

the habit of making the turn to the left or over the parallel track for the purpose of allowing an approaching car to pass him; as he said: "With a load of hay I turn to the left-hand side of the street to let the car go by. That is what I did on this occasion, I turned toward the left-hand side of the street."

We have this situation, therefore: Plaintiff, driving on the defendant's track knowing that a car is approaching him, turns with a view of making a wide curve with a long load of hay for the purpose of crossing the street, takes one glance back when he first starts on his course and does not again look toward the car at all. I think within the cases he was guilty of contributory negligence as matter of law. (*Lynch v. Third Ave. R. R. Co.*, 88 App. Div. 604; *McEntee v. Met. St. R. Co.*, 110 id. 673; *Lofaten v. Brooklyn Heights R. R. Co.*, 184 N. Y. 148.)

The plaintiff testified that he did not hear any warning. He does not pretend that he was paying any attention, and a warning was unnecessary (*Lynch v. Third Ave. R. R. Co.*, *supra*), for he knew the car was approaching; but the evidence is overwhelming that the warning was given.

There is an error in the charge, which, it seems to me, in any event must require a reversal of this judgment. When the plaintiff made the turn he was not at a street intersection. The court charged the jury that "the defendant's car had the paramount right of way superior to that of vehicles, and that it was the duty of the driver of this hay wagon to use reasonable care to keep out of the way of approaching cars." He was then asked to charge as follows: "I ask your Honor to charge the jury that if plaintiff drove so as to be free from the cars, so as to be free from the course of this east-bound car, out of that course, and then turned toward the driveway without any precaution, taking no precaution for his safety, he was guilty of negligence and cannot recover." The court responded: "I think I will leave that to the jury." The defendant was entitled to this instruction. The evidence tended to show at least that the plaintiff, after he had left the track on which he was traveling, turned again without looking back or giving any heed to the approaching car, although he knew it was coming. If so, he was not entitled to recover, and that was the gist of the request.

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The order should be reversed and the motion for new trial granted, with costs to appellant to abide event.

McLENNAN, P. J., KRUSE and ROBSON, JJ., concurred on the ground of error in the charge discussed in the opinion; WILLIAMS, J., dissented.

Order reversed and motion for new trial granted, with costs to appellant to abide event.

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FRED AMBELLAN, Respondent, v. BARCALO MANUFACTURING  
COMPANY, Appellant.

Fourth Department, March 6, 1907.

**Negligence—injury by fall of chute—release of action procured by fraud—charge construed—failure of plaintiff to tender consideration for release not available on appeal.**

A master maintaining a chute used to slide merchandise from one floor to another is bound to so secure it that it will not fall, which duty cannot be delegated so as to relieve the master from liability for injuries so caused.

When it is a question as to whether a release signed by the plaintiff was obtained by misrepresentation of the master and was signed by the plaintiff without knowing its contents, and when the court has charged that if when the plaintiff signed he knew and understood the language of the instrument that he could not recover, a subsequent refusal to charge that if the plaintiff "knowingly" executed the release he cannot recover, must be construed to mean that the court refused to charge that the plaintiff could not recover if he knew he signed the paper, that interpretation being necessary in view of the prior charge.

Although the effect of such release may not be avoided without repaying or tendering the consideration, the objection cannot be taken for the first time upon appeal.

APPEAL by the defendant, the Barcalo Manufacturing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 5th day of March, 1906, upon the verdict of a jury for \$6,000, and also from an order entered in said clerk's office on the 5th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

*J. H. Metcalf*, for the appellant.

*W. H. Corcoran* and *H. J. Swift*, for the respondent.

WILLIAMS, J.:

The judgment and order should be affirmed, with costs.

The action was to recover damages for personal injuries alleged to have resulted from the defendant's negligence. The injuries were caused by the fall upon plaintiff's head of the lower part of a chute, used to slide merchandise from the second to the first floor in defendant's manufactory. Upon sufficient evidence the jury found this part of the chute was not safely and properly secured, but was left so that it fell upon plaintiff when he was passing under it in the performance of his duties as an employee of the defendant.

The question here is whether this negligence was that of the defendant or of a coemployee. We are of the opinion that the duty of securing the chute so that it would not fall was one imposed upon the defendant, and that it could not be delegated so as to relieve defendant from liability. We have examined the cases cited by the respective counsel. It is difficult sometimes to say just where the dividing line is, but we think this case, under the evidence, is one where the negligence is the defendant's.

After the accident occurred there was a transaction between the plaintiff and the defendant's superintendent, when eighty-five dollars was paid to the plaintiff and a release taken from him of this cause of action. It was a general release, but covered this claim. The defendant alleged in its answer that it had settled and taken a full release from the plaintiff, and on the trial gave evidence as to the transaction, the payment and the release, by the superintendent and two other witnesses. The plaintiff gave evidence as to the matter also, not denying the receipt of the money, or the signing of the release, but claiming that the transaction was the payment of seven weeks' wages, to enable plaintiff to go away for a rest and to get well, and that he was told the paper signed was merely a receipt for the money. His claim was that there was no talk about a settlement or release, and that he was deceived as to the contents of the paper he signed by the misrepresentations of the superintendent of the defendant. The court submitted this ques-

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tion of fact to the jury, read some evidence, and stated the claims of the parties with reference to it, and charged: "If at the time the plaintiff accepted the \$85 and signed the release, he knew and understood the language contained in it, he cannot recover in this action. If at the time the plaintiff accepted the \$85 and signed the release, he knew and understood that in paying him the money the defendant intended thereby to compromise and settle for any and all claims which he might have against it by reason of his injury upon April 27th, 1903, he cannot recover in this action. If you find either of those facts in that way, it bars a recovery." The defendant took no exception to the charge on this subject, but made this request: "I ask the court to charge the jury if the plaintiff knowingly executed this release, he cannot recover." The court declined so to charge, and defendant excepted. Evidently the court understood the request to mean that the plaintiff could not recover if he knew he signed the paper, not if he knew the contents of it when he signed it. The request was susceptible of two constructions. It cannot be supposed the court intended here to take back all it had said in detail in the body of the charge. The defendant did not except to the law as stated by the court in the body of the charge, and cannot now be heard to say that it did not fully and explicitly refer to all the elements necessary to invalidate the release. Of course, plaintiff's understanding of the contents of the paper would not control unless the defendant's superintendent understood the same thing, or unless there was fraud in inducing plaintiff to sign it. Fraud was claimed in that the superintendent represented it to be a receipt merely, and thus deceived plaintiff as to its contents. If by exception or request this principle had been called to the attention of the court, the charge would undoubtedly have been made explicit and satisfactory to defendant in that respect. It might be suggested that the release could not be avoided without paying back or tendering to defendant the eighty-five dollars. No such suggestion was made during the trial. If it had been, the plaintiff might then have paid the money or made the tender, if this is a case where such payment or tender was required. It is only necessary to hold here that the question not having been raised on the trial, cannot be urged here as a ground for reversal of the judgment.

The finding of the jury upon this question of settlement and release was supported by the evidence, and should not be set aside as contrary to or against the weight of the evidence.

All concurred.

Judgment and order affirmed, with costs.

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OSWALD D. FRANCE, Plaintiff, *v.* THE NEW YORK CENTRAL AND  
HUDSON RIVER RAILROAD COMPANY, Defendant.

Fourth Department, March 6, 1907.

**Negligence — injury by shifting railway switch — erroneous nonsuit.**

In an action by the conductor of a railroad to recover damages for injuries received, it appeared that the locomotive and first cars of the train on passing over a switch took a track bearing to the left, while the rear truck of one car and the remaining cars took the track bearing to the right. It appeared that the switch in question was controlled from a tower house, and the system had been installed within a few hours of the happening of the accident. It was shown that there was no bumping of the wheels on the ties as if they had left the track, nor were there any marks or scratches on the switch points or car wheels. The cars and rear truck were free from defects which might have caused the accident.

*Held*, that a nonsuit was error:

That on the evidence the jury would have been justified in finding that the accident was caused by the improper shifting of the switch by the towerman during the passage of the train, or that the switch was defective.

MCLENNAN, P. J., dissented.

MOTION by the plaintiff, Oswald D. France, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon a nonsuit directed by the court after a trial at the Erie Trial Term in October, 1903.

*Tracy C. Becker and Alfred L. Becker*, for the plaintiff.

*Ira A. Place and Charles A. Pooley*, for the defendant.

WILLIAMS, J.:

The exceptions taken by plaintiff should be sustained and the motion for a new trial granted, with costs to plaintiff to abide event.

The action is to recover damages for injuries to plaintiff alleged to have resulted from defendant's negligence.

The nonsuit was granted for failure to make a case for the jury

as to the defendant's negligence. Only this question need be considered here. No other question is raised by counsel.

The plaintiff was a conductor on the Lehigh Valley railroad, and on the occasion of the accident was upon a train running between Suspension Bridge and Buffalo. Between the bridge and Tonawanda the Lehigh trains used the tracks, and were subject to the control and the rules and regulations of the defendant, the Lehigh having, however, its own train crews. About 1,000 feet from the station at the bridge there was a switch. Lehigh trains for Buffalo at this point took the track bearing off to the left; other trains took the right track leading upon the Michigan Central tracks and across the bridge over Niagara river. At the time of the accident the plaintiff's Lehigh train left the bridge station for Buffalo. As it approached the switch in question, the train took the Buffalo track, and the engine and two cars and the forward truck of the third car passed the switch safely and properly, but the rear trucks of the third car, the last car on the train, took the bridge track, and ran out towards the Michigan Central tracks. As a result, the third or rear car was drawn out of shape, was shaken up, and the plaintiff was thrown from the rear platform and injured. For these injuries this action is brought. There was evidence in the case tending to show that the rear truck of this car did not leave the rails at all, but merely took the bridge track, while the balance of the train, including the front truck of this car, had taken the Buffalo track. The question, therefore, is what was the cause of the passage of the rear truck of the car in question to and upon the bridge track. The plaintiff claimed, and we think the jury might have found, that for some reason the switch was changed while the third or rear car was passing over it and before the rear truck came to the switch. The plaintiff gave evidence tending to show that there was no jumping of the wheels over the ties, as if they were off the track, there were no prints of the wheels in the ground or upon the ties after the accident occurred, and no marks or scratches on the switch points or car wheels. Evidence was also given tending to show that the car and the rear truck were free from any defects, which could have caused the accident. If then the switch was changed while the car was passing over it, what was the cause of the change? The plaintiff claims that it moved either by reason of

defects in the switch or its appliances, or by reason of the interference of some person having control of the appliances for moving the switch. The switch was controlled from the tower house, the system having been installed within a few hours of the happening of the accident.

At the close of the plaintiff's evidence a motion for a nonsuit was made, and the court then announced: "I am going to submit the case to the jury on the single question as to whether the plaintiff has proved, by a preponderance of evidence, that the negligence of the towerman in the operation of this switch caused this accident, and whether the plaintiff has also proved by a fair preponderance of evidence that none of the other possible causes of the accident existed." This would have precluded the jury from finding that the accident resulted from a defective condition of the switch or its appliances, for which the defendant would have been liable as well as for the active negligence of the towerman in moving the switch. But after the defendant had given its evidence the court withdrew from the jury the only ground of negligence it had intended to submit, and granted a nonsuit, holding that there was no evidence *sufficient* to go to the jury that the switch moved while the car was passing over it. In so disposing of the case, however, the court passed upon the credibility of the evidence of the man in the tower house and of experts as to the effect and working of the protector bar. We think the jury might find upon all the evidence that the cause of the accident *was* the moving of the switch for some reason, while the car was passing, and that this was not a question to be determined by the court. Counsel have argued this question of fact on the one side and the other. We do not care to go into the matter here. If the jury might find that the switch moved while the car was passing over it, they might find further that the defendant was guilty of negligence with reference to it. It was defective in itself, or the appliances for moving it were defective, or the towerman was negligent in operating such appliances, and the accident was so caused. The case should have been submitted to the jury.

All concurred, except McLENNAN, P. J., who dissented.

Plaintiff's exceptions sustained, motion for a new trial granted, with costs to the plaintiff to abide the event.



ISABEL WOLFORD, Respondent, v. THE NEW YORK CENTRAL AND  
HUDSON RIVER RAILROAD COMPANY, Appellant.

Fourth Department, March 6, 1907.

**Negligence—injury by sudden starting of train while passenger  
alighting.**

The plaintiff, a woman unused to travel, was riding on the defendant's train. As the train approached the station where she intended to alight the trainman opened the door and called out the station and said, "All change," and thereupon went into the car ahead. The train actually stopped about 150 feet from the station platform, and the plaintiff believing that she had arrived at the station, and while in the act of alighting, was thrown and injured by the sudden starting of the train.

*Held*, that the questions of the defendant's negligence and the absence of contributory negligence of the plaintiff were properly submitted to the jury;

That the act of the trainman in calling out the station when he knew that the train had not arrived at the platform, and that it was not time for passengers to alight, was negligent;

That although the plaintiff was inexperienced in traveling and unacquainted with railroads, she was not, as a matter of law, guilty of contributory negligence in traveling alone.

McLENNAN, P. J., dissented.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 23d day of May, 1906, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 16th day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

*A. H. Cowie*, for the appellant.

*Wilson & Wortman* and *Theodore E. Hancock*, for the respondent.

WILLIAMS, J.:

The judgment and order should be affirmed, with costs.

The action is to recover damages for personal injuries alleged to have resulted from defendant's negligence. The appellant claims

there was insufficient evidence upon which to base the findings by the jury of negligence on the part of the defendant and absence of contributory negligence by the plaintiff.

The facts which the jury might find, and upon which they might base their verdict, are as follows: The plaintiff was a married woman, forty-eight years old, and a farmer's wife. She lived in a part of Onondaga county remote from the city of Syracuse. She had been to Syracuse but twice before the accident; once about six years before and once about two years before, and on both these occasions some one was with her. At the time of the accident she was alone. She was unused to traveling. She took the train at Weedsport about midday. She sat in the coach, the second seat from the front door. As the train neared the Syracuse station, but before it arrived at the station platform, the place for passengers to get out, the trainman opened the front door of the coach, near where plaintiff sat, and called out "Syracuse" three times, and said "All change," and then went into the car ahead. The train stopped, the plaintiff left her seat, went to the door and started to get off the train. Other passengers were moving also. She had a valise in her hand. She supposed the train had arrived at the place where the passengers were to alight. She went out upon the platform of the car and started down the steps. When she reached the second step and was about to step down to the third one the train started suddenly, with a jerk, and threw her to the ground. She used care and caution in going down the steps, having hold of the rail with her hand. The place where she was thrown off was in fact, about 150 feet from the station platform. She did not notice that she was *not* opposite the platform when she attempted to alight. She supposed she *was*, because of the call and throwing open of the door, and the moving of other passengers, and did not have that in mind, and did not look particularly to ascertain whether she was opposite the station platform or not. She was seriously injured, and no claim is made that the verdict, \$2,000, was excessive.

There was other evidence which, if believed, would have varied these facts somewhat, but the jury was not bound to believe the railroad employees, and disbelieve the plaintiff. Upon the facts referred to above, there can be no doubt that the question of defendant's negligence and the absence of contributory negligence by the

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plaintiff were properly submitted to the jury. The conduct of the trainman, when he knew the train had not arrived at the station platform and it was not time for the passengers to alight, and that the train was liable at any moment to start suddenly, when passengers might be obeying the instructions he had given them, "All change," was negligent in the extreme, and was liable to cause injury to passengers not acquainted with the locality and unused to traveling. It might not deceive some passengers, but it was conduct almost certain to cause trouble to such a person as the plaintiff was.

And it cannot be said as matter of law that the plaintiff was guilty of contributory negligence. She had a right to travel alone, although inexperienced, and unused to traveling, and unacquainted with railroads and their habits when their trains were approaching Syracuse. Her care and prudence were to be measured, like that of a child, by her degree of intelligence and knowledge of the world and of the ways of railroads.

All concurred, except McLENNAN, P. J., who dissented on the ground that the evidence wholly failed to establish actionable negligence on the part of the defendant.

Judgment and order affirmed, with costs.

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WILLIAM P. WILLIAMS, Respondent, v. FIRST NATIONAL BANK of  
UTICA, N. Y., Appellant.

Fourth Department, March 6, 1907.

**Negligence — injury by breaking of plank used as scaffold — when structure not within section 18 of the Labor Law — question as to whether relation of master and servant exists is for jury.**

When a plaintiff being employed by one master is injured while at work as a carpenter in the building of the defendant by the breaking of a scaffold, the question as to whether the relation of master and servant existed between plaintiff and defendant is for the jury and not for the court.

A structure consisting of a plank laid across two wooden horses ten feet high and moved about by workmen at their convenience is not a scaffold within the meaning of section 18 of the Labor Law.

When it is shown that the plank which broke was within the control of the plaintiff and his fellow-workmen and was placed and continually readjusted by them, and that there were many other planks on the premises which they could have used, the defendant is not liable.

SPRING, J., dissented, with opinion.

APPEAL by the defendant, the First National Bank of Utica, N. Y., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oneida on the 15th day of June, 1906, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 1st day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Frederick G. Fincke*, for the appellant.

*Thomas D. Watkins*, for the respondent.

WILLIAMS, J.:

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

The action was to recover damages for injuries to the plaintiff, alleged to have resulted from defendant's negligence. The plaintiff was a carpenter, and at the time of the accident was working in the defendant's bank building, which was being reconstructed and repaired. With another carpenter he was standing upon a plank laid across two wooden horses engaged in putting a casing into a window frame. The plank was eight to ten feet above the floor. It broke and the two men fell, and plaintiff received the injuries for which the recovery was had.

The action was brought under section 18 of the Labor Law (Laws of 1897, chap. 415) and was so tried and submitted to the jury. The recovery must, therefore, be sustained, if at all, under the statute. Section 18 of the Labor Law provides: "A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper

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and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

The court held as matter of law that the relation of master and servant existed between the defendant and plaintiff, and that the structure was a scaffold under section 18 of the statute. It submitted to the jury only the question whether the scaffold was safe, suitable and proper, charging that if it was *not* so the plaintiff was entitled to recover. The defect complained of was only that the plank was not strong enough for the purposes for which it was used.

There was considerable evidence given bearing upon the relations between the plaintiff and the defendant and the firm of Roberts & Williams whose general employee plaintiff was. It seems to us the question as to whether the relation of master and servant existed between the plaintiff and defendant was, at least, a question for the jury and not for the court, and if for the court it must be based solely upon the evidence given in behalf of defendant and should have been determined in defendant's rather than plaintiff's favor.

Moreover, this structure was not such a scaffold as was within the contemplation of the Legislature in enacting the Labor Law. (*Schapp v. Bloomer*, 181 N. Y. 125; *Stokes v. New York Life Ins. Co.*, 112 App. Div. 77; *Sutherland v. Ammann*, Id. 332.)

In the *Schapp* case the court, among other things, said: "The limitation to specified cases shows that it (the statute) was not intended to include scaffolding in all cases. What the Legislature evidently had in mind was scaffolding on buildings or structures where its use was obviously dangerous to life and limb of an employee thereon in case of a fall. If ordinary staging, put up in a room from four to six feet above the floor, to facilitate the placing of fixtures, was intended to be included as among the specified cases, we should find it difficult to suggest a scaffold that would not fall within the limitation of the statute. To so hold would practically extend it to all cases in which scaffolds are used. This would be an unauthorized departure from the rule of construction to which we have called attention."

This language goes farther than holding that that case was not covered by the statute because the scaffold was being used for putting up of shafting, a use not covered by the language of the statute.

This same principle was applied in the two Appellate Division cases cited above.

Again, this structure was a movable one, composed of two horses and a plank, and prior to the accident it was moved from place to place by the plaintiff and his colaborers. The adjustment of the plank upon the horses was within the control of these men, and was made by them before the accident occurred. They had worked upon it safely for some time before it was changed and the plank was readjusted by them, and it had served them properly down to the time the accident occurred. If in the readjustment the horses had been placed a little nearer together, it would not have broken when it did. There were many other planks about the premises which could have been used by these men to reinforce the one they were using.

Under these circumstances, certainly, the defendant could not be held liable for the injuries to the plaintiff, for which plaintiff and his colaborer were alone responsible. (*Rotondo v. Smyth*, 92 App. Div. 153; *Stokes v. New York Life Ins. Co.*, 112 id. 77; *Hutton v. Holdbrook, etc., Contracting Co.*, 139 Fed. Rep. 734.)

All concurred, except KRUSE, J., who concurred in result only, and SPRING, J., who dissented.

SPRING, J. (dissenting):

The plaintiff was a carpenter in the general employment of Roberts & Williams, who were contractors. The defendant was repairing and altering its bank building, and employed a man named McDermott to oversee the work and take charge of the men employed. The directors of the bank carried on the banking business while the repairs on the banking office were going on. They desired to have the men do the work by the day and under their control, and at times when it would cause the least inconvenience to the banking business. They accordingly arranged with Roberts & Williams to furnish carpenters to them as they were needed during the day. They paid Roberts & Williams a fixed sum by the day for the men, and also a commission for supplying them. Roberts & Williams had nothing to do with the repairs or alterations. The bank furnished all the materials and provided its own superin-

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tendent. The evidence on this branch of the case was undisputed and came from the president of the defendant and McDermott, and the trial court held as matter of law that the relation of master and servant existed between the defendant and the plaintiff.

I think this ruling is correct. (*Wyllie v. Palmer*, 137 N. Y. 248; *McInerney v. Del. & Hud. Canal Co.*, 151 id. 411; *Hallett v. N. Y. C. & H. R. R. Co.*, 167 id. 543.) In the case first cited the defendants furnished fireworks for a fourth of July display in the city of Auburn at the instance of a committee of its citizens who had the matter in charge. The defendants, at the request of the committee, sent a man, with a boy as a helper, from Rochester to aid in discharging the fireworks. They were in the general employ of the defendants, but acted under the direction of the citizens' committee, and when the boy was manipulating the rockets one of them was discharged, injuring the plaintiff. The alleged liability of the defendants was based upon the fact that the boy, who committed the act, was the servant of the defendants, but the Court of Appeals held otherwise. The court used this language at page 257: "The fact that the party, to whose wrongful or negligent act an injury may be traced, was at the time in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time and who has the right to control and direct his conduct."

The same proposition was restated in *Higgins v. Western Union Telegraph Co.* (156 N. Y. 75, 78): "The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that, too, when their general employer is interested in the work."

When the plaintiff first came to work a carpenter was engaged in putting the casing into the windows, which were thirteen or fourteen feet in height. He was standing on a plank resting on two sawhorses about ten feet high and six or seven feet apart. The sawhorses were permanent structures, hinged at the top and had been used "a good deal" before the plaintiff commenced work there. The plank was ten or twelve feet long, ten inches in width

and two inches thick and was covered with mortar. The scaffolding was in place before the plaintiff used it. He was directed by McDermott to go upon the plank and assist Owens, the other carpenter. The two worked together that day and until the middle of the forenoon of the second day, when the plank broke, precipitating the plaintiff to the floor and seriously injuring him.

In the first place the defendant was "repairing, altering" its building within the purview of the Labor Law (Laws of 1897, chap. 415, § 18). I think the sawhorses with the plank for the workmen to stand upon for making the repairs constituted a scaffolding within the meaning of this law. No particular form of construction is provided for in the statute. It is expected to be a temporary structure for men to stand upon to do the work. Whether made at the side of a building by nailing crosspieces to supports for the planks to rest upon or by sawhorses in order that they may be changed the more readily, they serve the same purpose. In interior alterations it is well known that a frequent method of constructing the scaffolding is by sawhorses with plank laid upon them. This method prevents injuring or defacing the interior of the buildings. These sawhorses are often made of great height for use in high rooms. It is just as important that the men be protected from a dangerous temporary arrangement of this kind as from a more substantial staging on the exterior of a building.

The cases cited in the prevailing opinion, to my mind, do not sustain the proposition that this arrangement did not come within the scope of the statute.

In *Schapp v. Bloomer* (181 N. Y. 125) the defendants had erected a new factory and were engaged in putting up shafting and placing machinery in the building. The men built a scaffolding from four to six feet high by laying planks upon horses and upon rolls of paper in the room, and also by placing one end upon a board nailed to an upright post and supported by a brace. The plaintiff was present when this contrivance was arranged, but did not participate in its construction. The court held that the placing of this shafting and machinery was not "the erection, repairing, altering or painting of a house, building or structure," and that the Labor Law limited the scaffolding within the act to these "specified cases." The court did not hold that the temporary appliance for



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the men to stand upon was not a scaffolding if the work for which it was utilized had been within the compass of the statute.

In *Stokes v. New York Life Ins Co.* (112 App. Div. 77) the plaintiff fell from a temporary scaffolding when washing a ceiling. The act does not include that kind of work, and the court so held.

Likewise in *Sutherland v. Ammann* (112 App. Div. 332) the decision was placed upon the ground that the work which the plaintiff and his fellow-workmen were engaged in was not "in the erection, repairing, altering or painting of a house, building or structure."

These cases do not depend on the character of the scaffolding. If the same kind of scaffolding had been at the outside of the building for the men to stand on to nail clapboards on the house, or to put a cornice under the eaves, a different decision might have been rendered. In this case the scaffolding, without question, was for the purpose of performing work mentioned in the statute. It was, therefore, one of the "specified cases" within the legislative intention where the safety of the plaintiff was required to be guarded. (*Stewart v. Ferguson*, 164 N. Y. 553; *Swenson v. Wilson & Baillie Mfg. Co.*, 102 App. Div. 477.)

During the time the plaintiff was at work on this scaffolding it was moved two or three times to accommodate the plaintiff and his fellow-workmen. The men moved one of the sawhorses; the plaintiff, with a stick or board, held up the end of the plank which had rested on the sawhorse moved, and the men then pushed along the other sawhorse, the plaintiff carrying along the end of the plank until it rested on the sawhorse again.

The claim is made and is sustained in the prevailing opinion that the plaintiff was engaged in readjusting this scaffold, and, consequently, cannot recover. The only theory upon which this claim can be founded is that the plaintiff knew or should have known that the plank was unsound and unsafe. The primary duty of furnishing a scaffold which is not "unsafe, unsuitable or improper" is cast upon the master. It is an affirmative obligation. Probably if the contrivance furnished is manifestly unsafe, an employee injured in its use cannot recover for injuries; but the mere fact that he may have known, does not relieve the master, who has disregarded a plain duty imposed upon him for the protection of his servant.

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The plank was in place when the plaintiff commenced work. He had nothing to do with its selection. He had a right to assume that the defendant had performed its duty until he was apprised that the plank was unsound, or it was obviously in that condition. (*Jenks v. Thompson*, 179 N. Y. 20, 26.)

As already noted, the plank was covered with lime and mortar; and while now the record discloses undisputably that it was a defective and improper plank for the purpose for which it was used, the evidence fairly shows that the plaintiff could not have discovered its unsuitability without a closer examination than he was called upon to make. In moving this contrivance the plank was three or four feet above his head, and it does not appear that the defect was discoverable from that distance and the plaintiff would not naturally have his eyes upward toward a plank covered with mortar.

In *Madden v. Hughes* (185 N. Y. 466) where, in one aspect of the case, the plaintiff was to construct the scaffold, the court in passing upon the relative liability of the parties said (at p. 470): "It was the duty of the master to furnish proper and safe material for the construction of the scaffold. It was the duty of the plaintiff if ordered to construct a scaffold to construct it in such a manner as to make it safe for him to work upon. It was his duty to use only safe and proper material. If, however, the planks used by him on this occasion were the planks furnished by the defendants and he did not know at the time of using them that they were unsafe and improper, he would not be chargeable with contributory negligence."

In *Jenks v. Thompson* (179 N. Y. 20) the plaintiff, a carpenter, who was not familiar with this kind of scaffolding, had been at work upon a scaffold made of hemlock boards and which was unsafe because composed of that material. He had been at work upon this particular scaffold for about half an hour and observed that "it was springy and that the boards were not nailed. He knew that it was composed of three boards or planks, laid upon joists or brackets, but we find no evidence to show that he had any knowledge that the boards were hemlock only seven-eighths of an inch in thickness and laid upon brackets nine feet apart." The court further said: "The proof was not, we think, sufficient to justify the trial court in holding, as a matter of law, that the scaffold was obviously unsafe or that the plaintiff had such knowledge of the manner of its con-

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struction and of the materials employed as to require the legal conclusion that he knew all the facts or that they were obvious, and that in using it he voluntarily assumed the risks of its safety. He had the right to assume that the defendant had performed the duties imposed upon him by law, or if not that he would be notified. 'It is well settled that the risks of the service a servant assumes in entering the employment of a master are those only which occur after the due performance by the employer of those duties which the law enjoins upon him.'"

In the present case the questions of contributory negligence and assumption of risk were submitted to the jury, and the verdict exculpated the plaintiff of any misconduct and of the charge that he knew the condition of this plank.

Assumption of risk was for the defendant to prove affirmatively, and it has failed to establish as matter of law that the plaintiff had sufficient knowledge of this defective plank to relieve the defendant of liability, the other essential facts having been proven.

In this case the positive duty was upon the defendant under the Labor Law to provide a scaffold for the plaintiff which was not "unsafe, unsuitable or improper," and that it was "so constructed, placed and operated as to give proper protection to the life and limb" of the plaintiff (Laws of 1897, chap. 415, § 18). This imperative duty could not be delegated. Even if it did furnish competent men and suitable materials, the obligation still remained. When the plaintiff commenced work, the plank upon which he was directed by the defendant's superintendent to stand to perform the work of the defendant was of hemlock, which was not suitable material for that purpose, and the plank was defective and unsound. The plank was covered over with lime and mortar so that the material or defect was not seen by the plaintiff, and it was not obvious to him. While at work, this defective unsafe plank broke, without fault on his part, and he was injured. I think the defendant is liable, if any effect whatever is to be given to the Labor Law designed to protect employees by rendering their work less dangerous.

The judgment should be affirmed.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide the event, upon questions of law and fact.

WALLACE H. WINQUIST, Plaintiff, v. JAMES F. PRESTON, Defendant.  
In the Matter of the Examination of JAMES F. PRESTON, Judgment Debtor, Appellant, in Proceedings Supplementary to Execution upon the Application of FRANK A. WALKER, Judgment Creditor, Respondent.

Fourth Department, March 6, 1907.

Court — **Municipal Court of Buffalo** — power of justice to grant adjournment.

The provisions of the Code of Civil Procedure relating to adjournment of cases in Justices' Courts apply to the Municipal Court of the city of Buffalo.

While a case may not be adjourned in a Justice's Court or in the Municipal Court of Buffalo against objection after the trial has been commenced, an adjournment granted in order to allow the correction of a commission issued to take testimony of foreign witnesses is proper when no evidence had been taken, but merely some preliminary objections and rulings had been made.

APPEAL by the judgment debtor, James F. Preston, the defendant in the above-entitled action, from an order of the County Court of Erie county, entered in the office of the clerk of said county on the 12th day of December, 1906, denying a motion to set aside an order for the examination of the defendant in supplementary proceedings, and to vacate the judgment upon which such proceedings were based.

*Charles Newton*, for the appellant.

*Peter Maul*, for the respondent.

WILLIAMS, J.:

The order should be affirmed, with ten dollars costs and disbursements.

The motion in County Court was based upon the claim that the judgment was void for want of jurisdiction in the Municipal Court of the city of Buffalo to render the same. It was claimed the court lost jurisdiction of the action by adjourning the same against defendant's objection. The case having been adjourned from time to time by consent of the parties, on May 23, 1906, it was called for trial. A commission had previously been issued to take the evi-

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dence of witnesses residing in Massachusetts, and had been returned. The plaintiff's counsel attempted to read evidence from this commission, when objection was made by defendant's counsel that the commission was not properly executed. The plaintiff then, before any evidence was read from the commission or taken from other witnesses, applied for an adjournment of the case to permit the commission to be returned to Massachusetts for correction. The defendant objected to the adjournment upon the ground that the court had no power to adjourn at that time, the trial having been commenced. The court overruled the objection and adjourned the case to June 1, 1906. On the adjourned day the defendant made no appearance, except to object to the jurisdiction of the court to proceed further in the case, having lost jurisdiction thereof by adjourning it without defendant's consent after the trial had begun. The plaintiff made his proof and the judgment was ordered. A transcript was filed in Erie county, and the supplemental proceedings were based thereon.

The question here is whether the judgment is void for want of jurisdiction in the Municipal Court, for the reason alleged. It seemed to be assumed on the trial that the court had power to adjourn the case to have the commission corrected, if it had been done before the trial had commenced. There are provisions in the Code of Civil Procedure for adjournment of cases in Justices' Courts, where commissions are issued; to afford opportunity for the execution and return of the commissions (§ 2983), and this provision is applicable to proceedings in the Municipal Court of the city of Buffalo (Charter [Laws of 1891, chap. 105], § 456, as amd. by Laws of 1898, chap. 101). These provisions undoubtedly cover cases where commissions are defectively executed and need to be returned for correction. We might be willing to concur in the defendant's position that a case could not be adjourned in Justices' Courts or in this Municipal Court after the trial has commenced. In this case, however, there had been really no commencement of the trial. The lawyers and the court had done some talking. Some offers, objections and rulings had been made, but no evidence had been taken, and we think the court correctly held that the trial had not commenced in such a sense as to deprive the court of the power to adjourn the case for the purpose of procuring the commission to be

corrected and returned. Having arrived at this conclusion, we do not deem it essential to pass upon the other questions raised upon this appeal.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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GEORGE M. McDONALD, Respondent, v. DONATO DE VITO and  
FRANK S. DE VITO, Appellants.

Fourth Department, March 6, 1907.

**Attorney and client — action for value of legal services — when direction of verdict error — client not liable when attorney repudiates contract for contingent fee.**

In an action to recover the value of legal services the value of the services is a question of fact and a direction of a verdict for the plaintiff is error.

When in an action by an attorney to recover the value of services rendered it appears that they were performed under a contract giving him a percentage of the recovery, he is not entitled to recover on a *quantum meruit* but only under the contract.

When an attorney repudiates a contract for a contingent fee, the client is under no obligation to proceed with the action, and is not liable for the value of services rendered.

APPEAL by the defendants, Donato De Vito and another, from a judgment of the County Court of Oneida county in favor of the plaintiff, entered in the office of the clerk of said county on the 6th day of June, 1906, upon the verdict of a jury rendered by direction of the court, and also from an order bearing date the 5th day of June, 1906, and entered in said clerk's office, directing the verdict in favor of the plaintiff.

*William R. Lee* and *August Merrill*, for the appellants.

*L. N. Southworth*, for the respondent.

KRUSE, J.:

While the evidence was undisputed that the plaintiff rendered legal services for the defendants at their request, for which the plaintiff was entitled to recover what they were reasonably worth,

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if the testimony of the plaintiff is to be taken as true, yet even in that view, the value of the services was a question of fact for the jury; but beyond that the testimony on behalf of the defendants tended to prove that the services were rendered in certain actions under a special contract for which the plaintiff was to receive twenty-five per cent of the recovery. If this agreement was made as claimed on behalf of the defendants, then the plaintiff was not entitled to recover what the services were reasonably worth, but was necessarily limited by the terms of his contract to twenty-five per cent of the recovery. It is true that the defendants refused to attend the trial of the actions, but that was after the plaintiff had refused to proceed under the contract as claimed by the defendants, and they had refused to proceed with the actions because of the plaintiff's repudiation of the contract as claimed by them. If the defendants were right in their contention, they were under no obligation to continue the services of the plaintiff, and had incurred no liability for what he had done.

We are clearly of the opinion that questions of fact were presented by the evidence which required the case to be submitted to the jury, and it was error to direct a verdict for the plaintiff.

The judgment and order should be reversed and a new trial granted, with costs to the appellants to abide the event.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellants to abide the event.

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MARIANO FRICANO, Appellant, v. COLUMBIA NATIONAL BANK OF BUFFALO, Respondent.

Fourth Department, March 6, 1907.

**Bank — relation between bank and depositor — erroneous charge as to liability of bank paying out money to person not depositor — estoppel.**

The duty of a bank, other than a savings bank, toward depositors is not measured by reasonable care in paying out the amount of the deposit. The relation of banker and depositor is that of debtor and creditor, the deposit becoming the money of the bank and the bank a debtor of the depositor. The bank is in no sense a trustee and the rule as to reasonable care in ascertaining the identity of

the person who draws the deposit has no application. The bank is bound absolutely to pay or discharge the liability like any other obligation.

Although a depositor by holding out another person as authorized to draw the deposit may be estopped, it is error to charge that the liability of the bank depends on the carefulness or good faith of the cashier in making payment without also submitting the acts of the depositor claimed to constitute an estoppel.

APPEAL by the plaintiff, Mariano Fricano, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 26th day of December, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 26th day of December, 1905, denying the plaintiff's motion for a new trial made upon the minutes.

The action was brought to recover the amount of a deposit claimed to have been made by the plaintiff in the defendant bank at various times between the 13th day of January, 1903, and the 8th day of August, 1904, upon which the plaintiff alleged there was due and unpaid to him a balance of \$830. The defendant denied (1) that the plaintiff was the real person who opened the account with it and (2) claimed that the account had been paid in full.

*Eugene M. Bartlett and Horace O. Lanza*, for the appellant.

*John Cunneen and V. H. Riordan*, for the respondent.

KRUSE, J.:

While the jury were well warranted in finding a verdict of no cause of action in this case, we think the rule of law by which the jury were instructed to determine the defendant's liability was incorrect. The controversy was over the right of the plaintiff's son to draw against the moneys deposited in the plaintiff's name, and to charge the same against that account. It was claimed by the defendant that, although the deposit was made in the name of the plaintiff, when the account was opened the moneys were actually deposited and the business done with the son, who afterwards drew the checks in the name of his father; and that the son actually presented with the deposit the identification card bearing the name which the son afterwards used in drawing the checks upon the bank, and which the bank honored and paid; that even if the money belonged to the father, and even if the father was present when the deposit was



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made by the son, the father by permitting the son to do what he did although he assumed to and did use the name of the father, may not now question as against the bank the right of the son to receive payment of the moneys so deposited. The plaintiff contends that while the son was with him when the account was opened, he himself made the deposit, wrote his own name upon the identification card, and that neither he nor his son were guilty of any imposition or fraud upon the bank, nor was the conduct of either such as to mislead the bank officers.

While the evidence was entirely sufficient to sustain the defendant's contention in that regard, we think the trial court inadvertently misstated the rule of law applicable to the case. The court charged the jury that the defendant was bound to use that degree of care which an ordinarily prudent banker would have used under the same circumstances to protect the true owner of the account in question from loss, and to safely keep and pay over the same on demand; that if the plaintiff did write his name on the signature card at the time of opening the account, and the cashier failed to exercise that degree of care which an ordinarily prudent cashier of a bank would have exercised under the same circumstances to ascertain the identity of the actual author of the signature, and in consequence of that failure the plaintiff has lost anything, the verdict should be for the plaintiff for the amount of the loss. He also charged, in substance, that if the plaintiff in fact did own the moneys and did write his name on the identification card, and if the defendant's cashier exercised such care as has been stated to ascertain and identify the actual owner of the money and the true author of the signature, and by the exercise of such care and prudence was unable to ascertain that the plaintiff was such owner and author, and if the son procured the signature of the plaintiff on the signature card and delivered it to the cashier and represented that it was the genuine signature, and the cashier was ignorant of the matter, and in the exercise of due care believed and relied on the statements and representations, and if for these reasons the defendant's officers were without knowledge or information as to the true owner of the account and the real author of the signature until after the account was closed, and if during the time the accounts stood open on the defendant's books its officers and employees exercised the degree of

care which they were bound to use to protect the plaintiff from loss, and finally paid it over on a check signed by the son Frank in the belief that he was the true owner, then their verdict must be for the defendant of no cause of action.

The defendant excepted to the part of the charge in which the duty of the bank to the depositor is measured by reasonable care. We think the exception was well taken. The liability of the bank to its depositors does not depend alone upon the exercise of reasonable care by the bank to ascertain the identity of the depositor. Nor is its obligation to keep or repay the fund that of reasonable care alone. Very likely what the learned trial judge had in mind was the rule applicable to savings banks, where usually rules of that character govern. (*Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314; *Kelley v. Buffalo Savings Bank*, 180 id. 171, 178.) Ordinarily, however, the relation of banker and depositor is that of debtor and creditor; as soon as the deposit is received it becomes the money of the bank and the bank a debtor to the depositor for that amount. It is in no sense a trustee, and the rule of reasonable care has no application in respect of moneys so received by the bank. It is bound absolutely to pay or discharge the liability like any other obligation it owes. (*Etna National Bank v. Fourth National Bank*, 46 N. Y. 82.)

We do not hold that the plaintiff may not have held out his son or permitted his son to act in such a manner as to warrant the cashier in relying thereon, and entirely justify the bank in paying the checks drawn by the son in the name of the father. The rule is well settled that an owner of property may hold out another or allow such other person to appear as the owner thereof in such a way that innocent third parties dealing with the apparent owner will be protected (*McNeil v. Tenth National Bank*, 46 N. Y. 325), on the familiar principle that when two innocent persons must suffer by the act of a third he who has enabled such third person to occasion the loss must bear it. This element, however, was not embodied in the charge. Carefulness or good faith alone upon the part of the cashier, without submitting the conduct of the plaintiff in connection therewith, was insufficient to warrant the bank in paying the son so as to exonerate itself from liability against the claim of the father,

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We conclude, therefore, that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the plaintiff to abide the event.

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THE ASSETS REALIZATION COMPANY, Respondent, v. THE CITY OF  
BUFFALO, Appellant.

Fourth Department, March 20, 1907.

**Set-off in equity — assignment of unmatured claim by insolvent — when assignee takes subject to set-off.**

Where an insolvent assigns a claim not yet due, the debtor may offset against the assignee a claim against the assignor due at the time of the assignment. In equity the fact that the claim of the insolvent is not due when he makes the assignment does not prevent a set-off, for it is only the difference between mutual debts that the court regards as owing by or to the insolvent.

Although the claim of the insolvent was for damages against a city for injury to real estate by the change of a grade crossing, which claim the municipality had by statute discretionary power to allow, the municipality having actually allowed the claim, may set off against the claimant's assignee a prior claim in its favor against the assignor.

It is no objection to such set-off that the assignee took the claim from the receiver of the claimant on its insolvency.

McLENNAN, P. J., and ROBSON, J., dissented.

APPEAL by the defendant, The City of Buffalo, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 15th day of November, 1906, upon the decision of the court, rendered after a trial at the Erie Special Term, sustaining the plaintiff's demurrer to the defendant's answer.

It appears from the plaintiff's complaint that the German Bank of Buffalo was the owner of certain premises situate in that city from about September 24, 1902, until on or about the 1st day of August, 1903, when it sold the same, reserving to itself, however, all rights and claims for damages or injury to the premises by reason

of any grade crossing or change of street grade, or work whereby the property had been injured or damaged; that the premises had been theretofore damaged by grade-crossing improvements, and that the defendant, the City of Buffalo, in and during the year 1901, caused to be built a viaduct in Babcock street in the vicinity of the premises, causing damage thereto in an amount exceeding \$980.70; that by an act of the Legislature of the State,\* passed April 28, 1904, discretionary power and authority was conferred upon the common council of the city of Buffalo, subject to the approval of the mayor, to audit, adjust and allow, in whole or in part, certain claims and demands, among others, the said claim of the German Bank; that thereafter and on or about June 12, 1905, the common council, with the approval of the mayor, did audit and allow said claim at the sum of \$980.70. The German Bank was declared insolvent by a judgment of the Supreme Court on the 22d day of December, 1904, and a receiver was appointed of all its assets and property. Thereafter, and on the 8th day of June, 1906, the receiver assigned the said claim and certain other assets and property to the plaintiff.

By the defendant's answer it appears that at the time the German Bank was adjudged insolvent and a receiver appointed of its property and assets, there was due and owing from the German Bank to the city of Buffalo, the defendant, the sum of \$114,822.85 on account of certain deposits theretofore made by the city with said bank under certain terms and conditions which need not be referred to at length here. No part thereof had been paid except the sum of \$57,411.42, leaving due and owing to the city the sum of \$57,411.43. These facts were embodied in the defendant's answer as a counterclaim, the defendant demanding a judgment that so much thereof be set off against the plaintiff's claim as was necessary to extinguish the plaintiff's cause of action. To this counterclaim the plaintiff demurred and the demurrer was sustained at Special Term.

*Louis E. Desbecker, Corporation Counsel, and John W. Ryan*  
for the appellant.

*Frank M. Spitzmiller, for the respondent.*

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\* See Laws of 1904, chap. 478.—[RER.]

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KRUSE, J. :

We agree to the general proposition that claims or demands sought to be set off must not only be mutual to the extent that they are owing by each to the other, but must also be due and payable. But this rule is not without its exceptions. And one of the exceptions is that where an insolvent makes an assignment owing a debt due at the time of the assignment, and also holding a claim not then due against the creditor whom he so owes, the creditor may offset his claim against the claim held by the assignee of the insolvent. In such a case the rule of equitable set-off may be invoked, and the fact that the debt owing to the insolvent is not due when he makes an assignment does not prevent the set-off in equity. For it is only the difference in the mutual debts which the court in such case will regard as the sum owing by or to the insolvent. (*Matter of Hatch*, 155 N. Y. 401.)

We think the case of *Fera v. Wickham* (135 N. Y. 223) and kindred cases not inconsistent with this view. In the *Fera* case neither claim was due at the time of the assignment, and the offset was there refused. But there is nothing in that case which holds that if the demand of the creditor of the insolvent had been due at the time of the assignment, the set-off could not be allowed against the claim of the insolvent, although not due at the time of the assignment. The reason it was not allowed in that case was because the claim of the creditor was not due at the time of the insolvency and assignment. This distinction is pointed out in the *Hatch* case, and is again recognized in the case of *De Camp v. Thomson* (159 N. Y. 444, 448).

It is contended, however, on the part of the plaintiff that at the time of the bank's insolvency the bank in fact had no claim against the city, it being entirely optional with the common council and the mayor to audit the claim or any part of it; that had the city officers seen fit not to have allowed the claim, the bank would have been entirely remediless; that at most it was only based upon a moral consideration and that its legal inception was long after the bank became insolvent and passed into the hands of a receiver, and even after the assignment by the receiver to the plaintiff. However that may be, a sufficient answer to that suggestion is that the city officers did not take that view of the claim presented by the bank.

They recognized its validity and made an award therefor, and whatever substance there is to the claim, which is now sought to be enforced against the city by the plaintiffs as assignees of the receiver of the bank, is based upon the recognized obligation of the city to pay the damages for injuries to the land belonging to the German Bank. It matters not whether the claim is founded upon equitable considerations or legal liability, or a mere moral obligation on the part of the city, the plaintiff's right is founded entirely upon this claim made by the bank against the city and transferred by the receiver of the bank to the plaintiff. It may be said in passing that if this award is to be regarded as having no substantial foundation, but is a mere gratuity, it is difficult to see how there is any enforceable claim against the city by the German Bank or its receiver, much less by the plaintiff. There is certainly no shadow of a claim against the city in favor of the plaintiff, other than that which the plaintiff has acquired through this assignment from the receiver of the bank. Nor is it an objection to the set-off that when the bank became insolvent and its assets passed into the hands of a receiver, the claim against the city was unliquidated and in an inchoate and dormant state, since it passed to the receiver and from the receiver to the plaintiff as an asset burdened with the right of an equitable set-off which the city had. As soon as the claim of the bank was adjusted and the award made, the right to set off the claim of the city against the bank, which had been due since the receivership began, attached and became effective and wiped out the claim of the bank represented by this award, the award being less than the amount owing to the bank.

We think the demurrer was improperly sustained. The interlocutory judgment should, therefore, be reversed and the demurrer overruled, with costs of this appeal and in the court below, with leave, however, to the plaintiff to plead over upon payment of costs.

All concurred, except McLENNAN, P. J., and ROBSON, J., who dissented.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to the plaintiff to plead over upon payment of the costs of the demurrer and of this appeal.

In the Matter of the Petition of MAYNARD N. CLEMENT, as State Commissioner of Excise, Respondent, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 22,756, Issued to ELIZABETH M. DUNBAR, Appellant, Respondent.

Fourth Department, March 6, 1907.

**Intoxicating liquors — when double house is not two buildings within the meaning of the Liquor Tax Law — certificate revoked for failure to file requisite consent — stay of proceedings.**

Under subdivision 8 of section 17 of the Liquor Tax Law requiring the consent of the owners of two-thirds of the total number of buildings within 200 feet of a saloon as a condition precedent to the granting of a liquor tax certificate, it is the number of buildings which controls and not the number of residents or the number of families or the number of owners of buildings.

A double frame building covered by one roof, divided by a partition in the middle, with separate staircases and separate front and rear entrances, which rests upon one entire wall with no mason work partition, the two portions of which are connected by a door, etc., is one building, not two buildings, within the meaning of the statute, although intended to be used by two families and although the owner has conveyed one portion of the building to his wife.

Thus, when said double building and one other building are the only dwellings within 200 feet of the premises for which the certificate is issued, and only the owners of the double building have consented to the traffic in liquors, the required two-thirds consent has not been obtained and the liquor certificate should be revoked.

Although in a proceeding to revoke a liquor tax certificate all proceedings by the petitioner have been stayed after final order revoking the certificate without a notice of appeal having been served and without requiring it to be served, no harm has been done when as a matter of fact the appeal was immediately taken and the case argued upon its merits.

MCLENNAN, P. J., and WILLIAMS, J., dissented.

APPEAL by Elizabeth M. Dunbar from an order of the Supreme Court, made at the Monroe Special Term, and entered in the office of the clerk of the county of Wayne on the 8th day of December, 1906, revoking and canceling liquor tax certificate No. 22,756 theretofore issued to her.

Also an appeal by the petitioner, Maynard N. Clement, as State Commissioner of Excise, from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk

of the county of Wayne on the 20th day of December, 1906, vacating and setting aside the service of a certified copy of the said order of revocation and granting a stay of all proceedings after entry of the order of revocation pending an appeal therefrom.

*Fred C. Goodwin and Joseph Gilbert*, for Elizabeth M. Dunbar, the certificate holder.

*Royal R. Scott and Russel Headley*, for the State Commissioner of Excise.

KRUSE, J.:

The sole question for our determination upon this appeal from the order of revocation is whether a certain double building is one building or two within the meaning of the Liquor Tax Law. This building and one other are the only buildings within 200 feet of the premises for which the certificate was issued. The owners of the double building have consented to the traffic in liquors upon the premises in question. The owner of the other building has not.

If the double building is two buildings, then the required two-thirds of the owners of buildings have filed such consent, and the liquor tax certificate was properly issued. If not, then the certificate was properly canceled and revoked, as was done by the Special Term.

Subdivision 8 of section 17 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1905, chap. 677) provides: "When the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners, \* \* \* of at least two-thirds of the total number of such buildings within two hundred feet so occupied as dwellings \* \* \*." The double frame building in question is situate on the towpath on the north side of the Erie canal in the village of Newark. It is about forty feet in width across the front and eighteen feet deep.



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There is a partition running through about the middle of the building and separate stair *cases* from the first to the second floor, and separate front and rear entrances for each side. The building rests upon one entire wall, with no mason work partition through the middle. The partition in the cellar is constructed of two by four-inch studding, lath and plaster on one side, and on the other side lath but no plaster. In this partition there is no opening, but in the one on the first floor there is a door connecting the two parts of the building. This door has been nailed up, nevertheless the nails can be removed without difficulty and the door used. One roof covers the entire building, and the eave trough and pipe discharges into one cistern which is used for the whole house. The lot back of the house is divided by a fence. So far as the evidence shows the building has always been used by two separate families. It has been built for many years, and for some time prior to the 7th day of August, 1906, the building and premises were owned by Charles L. Youngs, who resided in one part, the other part being occupied by tenants. On that day Youngs and his wife conveyed the premises to their son, William Vanderpool, with the reservation to Youngs and his wife during their natural lives of the double building and the premises. On the 18th day of August, 1906, Vanderpool conveyed to his wife the westerly portion of said premises, dividing the premises by a straight line extending through the center of the partition in said building. And thereupon and upon the 21st day of August, 1906, the certificate holder, Elizabeth M. Dunbar, presented her application for the liquor tax certificate with the consent of the owners of the double house, as required by the statute, stating therein that at least two-thirds of the owners of buildings within the prescribed limits had consented. At the same time she paid the tax for the unexpired portion of the tax year which ended on the thirtieth day of April next succeeding.

It is to be observed that in residential sections within the prescribed limits the statute requires the consent of the owners of two-thirds of the number of buildings used exclusively as dwellings, to permit the traffic in liquor at a given place. It is the number of buildings which control, not the number of residents or the number of families, or the number of owners of the buildings. It is

undoubtedly true that buildings, although connected and built together, may still retain their separate and individual characteristics, and be separate buildings within the meaning of this provision of the Liquor Tax Law; but we think this building is not of that character. It is an ordinary frame dwelling in a country village, and although used and evidently intended to be used for two families is in fact but one building. The conveyance by Vanderpool to his wife of the west half of the lot did not have the effect of changing the character of the building. The fact that the east and west halves of the premises were capable of being thus separately used and owned, may have been a proper circumstance to be considered upon the question of whether it was one or two buildings, but as I view it not a circumstance of much importance in this case. We reach the conclusion, therefore, that the Special Term was correct in revoking the liquor tax certificate.

As regards the appeal of the State Commissioner of Excise, we think it should be dismissed. The order, evidently through inadvertence, stayed all proceedings after the entering of the final order revoking the liquor tax certificate without the notice of appeal having been served or requiring it to be served, or even limiting the time of appeal. But no harm has been occasioned, for as soon as the State Excise Commissioner appealed from the order granting the stay, an appeal was at once taken, and the case has been argued upon the merits at the first term at which it could have been heard after the decision revoking the decision was made. We think the stay was entirely proper if the rights of the State had been properly safeguarded in the way of requiring the certificate holder to appeal promptly, for the question is not free from doubt. The certificate holder not only paid for obtaining the consents and the tax, but before doing so obtained the opinion of the deputy State Excise Commissioner advising her that the double building comprised two buildings. Whether or not the mistake, if any, was through misapprehension of the facts or of the law as we understand it, the certificate holder herself seems to have been diligent in ascertaining her right to the certificate, and to have acted in entire good faith.

The order revoking the certificate should be affirmed, but under the circumstances without costs. The appeal of the State Commis-

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sioner of Excise from the order granting the stay should be dismissed, without costs.

All concurred, except McLENNAN, P. J., and WILLIAMS, J., who dissented on the ground that within the meaning of the Liquor Tax Law the structure in question constituted two buildings.

Order affirmed, without costs. Appeal of State Commissioner of Excise dismissed, without costs.

JAMES M. HAMILTON, Appellant, v. FRANK V. FLECKENSTEIN, Defendant, Impleaded with WILLIAM S. MORSE and Others, Respondents.

Fourth Department, March 6, 1907.

**Appeal—judgment based on inconsistent findings that mortgage was taken in good faith and without notice, and that the mortgagees had knowledge of the fact that plaintiff claimed a lien upon the premises.**

When findings, whether made by the court as its own conclusions or at the request of an unsuccessful party, are inconsistent, and the determination of the facts involved in the findings is material and necessary to uphold the judgment, the defeated party on appeal is entitled to the benefit of the findings most favorable to his contention, and if the judgment stands without sufficient facts as a basis, it should be reversed.

When on the issue as to whether a mortgage on real estate was accepted by the mortgagees in good faith and without notice of a prior contract whereby the plaintiff was entitled to a conveyance of the lands on the completion of a building thereon, then in course of construction, the court finds, *first*, that the mortgage was accepted by the mortgagees "in good faith and without notice of the contract set forth in the complaint herein or of any other claim or lien of plaintiff's affecting said premises," and, *second*, that the plaintiff had conversations with a member of the firm which was furnishing lumber for the house, which firm subsequently became the mortgagees, in which he stated that the house was being built for him, and that on the plaintiff's request a member of the firm instructed the foreman to make changes in the lumber delivered, etc., the two findings are inconsistent, for upon the latter finding the mortgagees are shown to have had knowledge of facts sufficient to put them upon inquiry as to the plaintiff's claim to the premises.

KRUSE, J., dissented, with opinion.

REARGUMENT of an appeal by the plaintiff, James M. Hamilton, from a judgment of the Supreme Court in favor of the defendants William S. Morse and others, entered in the office of the clerk of

the county of Monroe on the 10th day of April, 1906, upon the decision of the court, rendered after a trial at the Monroe Special Term, dismissing the complaint as to said defendants.

The judgment appealed from was affirmed by this court July 12, 1906, and thereafter on appellant's application a reargument was granted. (See 114 App. Div. 915; 115 id. 883).

*Hugh O'Brien*, for the appellant.

*John P. Morse*, for the respondents.

ROBSON, J.:

Appellant's motion for reargument was founded upon the claim that certain findings of fact, made by the court at his request, were inconsistent with and directly contradicted the material finding of fact, made by the court, upon which respondents' right to the judgment, directed in the court's conclusions of law, was based.

The only question presented to the court at this time is whether the findings to which our attention is now directed are so diametrically opposed as to be necessarily irreconcilable. If these findings, whether made by the court as its own conclusions of fact, or at the suggestion of the unsuccessful party by requests to find, are inconsistent to that extent, and the determination of the facts involved in the findings is material and necessary to uphold and establish the right of the properly successful party to judgment in the action, then it follows that, the appellant being, of course, entitled to the benefit of the findings most favorable to his contention, the judgment stands without sufficient facts as a basis for its rendition, and should be reversed. (*Redfield v. Redfield*, 110 N. Y. 671; *Nickell v. Tracy*, 184 id. 386.)

The facts involved in this controversy are neither complicated nor obscure. In 1902 defendant Fleckenstein, besides one lot on Chili avenue at the end of Darien street, owned four other lots situate on the latter street in the city of Rochester. Upon each of these lots in the late summer, or fall, of that year he began the erection of a dwelling house. Some considerable part of the lumber used in the construction of these houses he purchased of the firm of William B. Morse & Sons, which firm the respondents now represent.

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The erection of the dwelling house on the Darien street lot, known as lot 14, which is the lot and premises in question in this action, was in pursuance of a contract, made on the fourteenth day of August of that year by Fleckenstein with the appellant Hamilton. By this contract Fleckenstein agreed, for the consideration to be paid him as stated in the contract, to sell and convey to Hamilton these premises, together with the house, which he was, as provided in the contract, to build thereon and complete by November 15, 1902.

The appellant Hamilton, carrying out in full his part of the contract, before the mortgage, hereinafter referred to, was given, had paid to Fleckenstein, as required by said contract, a considerable amount of the purchase price of the premises.

The respondent William S. Morse during all this time had the general management of the business of the Morse partnership; and on or about November 16, 1902, he required Fleckenstein to give security for the firm's claim against him for lumber furnished, which then amounted to \$2,700. After some negotiation it was agreed that one-half of that sum should be secured to the firm by Fleckenstein's note, payable one month after date, with a mortgage on lot 14 as collateral security therefor; and the remaining one-half by his two months' note with a mortgage on lot 16 as collateral. Lot 16 was at that time also under contract by Fleckenstein to another person, whose rights are, however, not in any way involved in this action. Fleckenstein's note with the mortgage on lot 14 was thereupon executed and delivered to Morse for the firm, and the mortgage was by him recorded in the clerk's office November 18, 1902.

Hamilton's contract was not recorded till long after the recording of the Morse mortgage; and it was never completed by Fleckenstein, who has since been adjudged a bankrupt.

Hamilton brings this action to have his contract with Fleckenstein declared to be a lien upon the premises, described therein, superior to the liens of any of the defendants in the action, including the Morse mortgage, and to foreclose his lien on the premises in the usual course.

Priority of record of respondents' mortgage, and that it was given for a valuable consideration, were not controverted on the trial. The litigated issue was whether the mortgage was taken in good

faith and without notice of appellant's interest in the premises. Upon this issue the court has found:

"*Third.* That said mortgage was executed and delivered to the mortgagees therein named for a good and valuable consideration and was accepted by them in good faith and without notice of the contract set forth in the complaint herein or of any other claim or lien of plaintiff's affecting said premises."

But he has also found at appellant's request:

"*Tenth.* That during the month of October, 1902, said James M. Hamilton called at the lumber office of said William B. Morse & Sons; that he thereupon met William S. Morse, with whom he was acquainted; that he had a conversation with said William S. Morse regarding the quality of the lumber which was being delivered by said William B. Morse & Sons for the construction of the house on the above-described premises; that in the course of the conversation he told said William S. Morse that the house which was being built on said lot fourteen Darien street was being built for him, said Hamilton.

"*Eleventh.* That thereupon the said William S. Morse instructed said Hamilton to go to the foreman in the lumber yard of said William B. Morse & Sons and explain to the said foreman what he wished; that thereupon said Hamilton did go to said foreman, told him that said house on said lot fourteen Darien street was being built for him, said Hamilton; that the specifications of the contract were for second grade pine siding, and that white wood siding was being delivered, and he, the said Hamilton, wished said siding to be changed to second grade pine; that the foreman agreed to make said change, and that thereafter second grade pine siding was delivered to the said house, number fourteen Darien street by said William B. Morse & Sons, and the white wood siding theretofore delivered was taken away."

There is sufficient evidence to support these two findings, and, if effect is to be given them, no other conclusion can be reached than that in the month preceding that in which respondents' mortgage was taken their general manager was notified by Hamilton that the house on the premises in question was being built by Fleckenstein for him, and that the former had such an interest in the premises that he at least had the right to and did insist that the material

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used in the erection of the house should conform to specifications in the contract under which Fleckenstein was then building the house for him. Though it is not specifically found as a fact by the trial court, it is yet worthy of notice that Fleckenstein testifies he told Morse in the interview, in which Morse demanded security, which was the day before the mortgage in question was given, that both lot 14 and lot 16 were under contract. Morse does not expressly deny that he was so informed by Fleckenstein at that time, though he does say that nothing of the kind was said on the next day when the mortgage was given.

It is true that Morse was not told either by Hamilton or Fleckenstein, prior to the time the mortgage was given, the extent or nature of Hamilton's interest in the premises; but that he then had information that Hamilton did claim some interest therein is equally clear. What this interest was an inquiry either of Hamilton or of Fleckenstein would have disclosed. Morse made no inquiry whatever, notwithstanding his knowledge that Hamilton asserted some interest in the premises. This information would, it seems, have made a prudent man alert to ascertain what that interest was, or was at least sufficient to demand of him reasonable effort and inquiry to obtain the further information as to the interest claimed, which was apparently ready at his hand.

If the facts which were brought to Morse's attention were sufficient to "put a prudent man upon inquiry," then, whether he made the inquiry or not, respondents must necessarily be held chargeable with notice of all facts which reasonable inquiry would have surely disclosed. (*Brumfield v. Boutall*, 24 Hun, 451; *Williamson v. Brown*, 15 N. Y. 354.)

It follows that the necessary effect of the findings, embodied in the tenth and eleventh requests to find, is that respondents did have implied actual notice of appellant's interest in the premises, and for the purposes of this appeal these findings in favor of the unsuccessful party must control, rather than the contradictory finding that the mortgage was accepted by respondents in good faith and without notice of any interest, claim or lien of plaintiff affecting the premises.

On the argument it was suggested by respondents' counsel that the trial court's acquiescence in the tenth and eleventh requests to find

was due to inadvertence, which was in a measure explained by the fact that the minutes of the evidence were not before the court at the time the requests to find were passed on. Whether or not these findings would have been made by the court, if attention had been called with greater precision to their statements and the evidence in their support, we are, of course, unable to determine. The present discussion will doubtless on another trial result in a harmonious decision of all material facts. We express no opinion as to the merits.

The judgment appealed from should be reversed and a new trial granted, with costs to the plaintiff to abide the event.

All concurred, except KRUSE, J., who dissented in memorandum.

KRUSE, J. (dissenting):

It is not proposed to reverse this judgment because it is against the weight of evidence or on account of any infirmity in any of the proceedings harmful to the appellant, save only that one of the findings of the trial judge contained in his decision is inconsistent with another finding of fact made at the request of appellant.

I think the two findings are not inconsistent. The tenth finding made upon the request of the appellant and relied upon by him for reversing the judgment is to the effect that during the month of October, 1902, the plaintiff in a conversation with William S. Morse, one of the defendant mortgagees, regarding the lumber which Morse's firm was furnishing, stated to Morse that the house upon the premises in question was being built for him. The mortgage was not taken until the 17th day of November, 1902, so that at the time when the conversation referred to took place Morse was not interested in any way in the title to the premises, nor was he called upon to make inquiry. Nor does it appear that at that time he even contemplated taking any mortgage upon the premises. It is true that if at the time Morse took the mortgage his attention had been called to this conversation or if it appeared that he still had in mind the information given him when the lumber was being sold he would be chargeable therewith. (*Foulks v. Reed*, 89 Ind. 370, 374.) It seems to me, however, that the third finding contained in the decision negatives that fact, for there it is specifically



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found that the mortgage was executed and delivered to the mortgagees for a good and valuable consideration without notice of the contract or of any other claim or lien of the plaintiff's affecting said premises.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

**AMBROSE HINE, Respondent, v. NORMAN HINE, as Sole Surviving Executor, etc., of JOSIAH HINE, Deceased, Defendant, Impleaded with HARRIET A. HUNTINGTON and JESSIE G. HUNTINGTON, as Executrices, etc., of ALLEN HINE, Deceased, as Executor, etc., of JOSIAH HINE, Deceased, Appellants.**

Fourth Department, March 6, 1907.

**Executors and administrators — property of estate acquired by executor in his own name impressed with trust — election of beneficiaries to share in property received in exchange — effect of assignment of claim by beneficiary — election of remedies.**

When on the sale of lands under a foreclosure brought by a testator his executors purchase in their individual names, they hold the property in trust as personalty for which they are liable to account.

An executor who, by reason of paralysis which incapacitated him, leaves the management of the estate to his coexecutor who is an attorney and apparently competent to transact the business, is not guilty of a breach of trust.

When, instead of disposing of lands with due diligence and dividing the proceeds among those entitled thereto, executors trade the property for other property, they become personally responsible for the value of the land at the time of the exchange, unless it were made with the consent of the persons entitled to the estate or were subsequently ratified by them.

But when a mortgage upon the lands so taken in exchange by the executors is foreclosed and a person entitled to the proceeds assigns his interest "if any" in the surplus money, he is bound by an election, and is not entitled to charge the executors with his portion of the value of the lands exchanged, even though in his assignment he stated that he made "no claim whatever to such surplus moneys or any part thereof."

Such assignor is as much bound by his assignee's receipt for the share of the surplus as if he had received it himself.

A *cestui que trust* is at liberty to elect to approve an unauthorized investment by the executors or to reject it, but he must either affirm or disaffirm, and having once made his election it is binding on him.

Thus, when a legatee holding property of the estate in which other legatees have interests, transfers it to the executor who converts it to his own use and is compelled by the other legatees to account therefor, there is an election of remedies by them and they cannot thereafter hold their colegatee on an implied trust.

SPRING, J., dissented in part.

APPEAL by the defendants, Harriet A. Huntington and another, as executrices, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 23d day of July, 1906, upon the decision of the court rendered after a trial at the Onondaga Special Term.

*Daniel A. Pierce and Charles C. Cook*, for the appellants.

*Homer Weston*, for the respondent.

ROBSON, J. :

No controverted question of material fact appears in the record presented in this case, and a recital of the facts disclosed by the evidence will direct us to the well-settled principles of law to be applied in determining the rights of the parties to the action, which the judgment should have declared.

The plaintiff with his two brothers, Norman and Allen Hine, and his sister, Harriet A. Huntington, were residuary legatees and devisees in equal shares under the will of Josiah Hine, their father, who died April 21, 1890. This will was admitted to probate May fourteenth of that year, and letters testamentary thereon were on that day duly issued to the two sons, Norman and Allen, who were named therein as executors. Josiah Hine left a considerable estate, a large part of which has been paid and distributed to those entitled thereto, and all the specific and general legacies have been discharged, and the residuary legatees are now the only persons whose rights and interests have not been fully and satisfactorily adjusted.

The testator prior to his death had foreclosed a mortgage, securing the payment of \$4,400 upon a farm which is referred to as the Stearns farm, upon which mortgage there was then due the sum of \$2,000 and to become due the sum of \$2,400. On the sale pursuant to the judgment of foreclosure the property had been struck off to Norman Hine, who was the plaintiff's attorney in that action.

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The deed of the premises was not delivered until the executors had qualified, when title was taken by them in their individual names, and not in their representative capacity. This sale was afterwards duly confirmed, the purchase price, for which the premises had been originally struck off on the sale, and expressed as the consideration in the deed, being \$2,187.81. Nothing was paid by Norman and Allen personally as consideration for the transfer to them. Nothing beyond the title to this farm seems to have been obtained on the mortgage security; and it does not appear that anything beyond that could have been secured. Of course, it is unimportant whether title was taken by the executors in their names as individuals, or with the addition denoting their representative capacity as executors. They would still hold the property in trust and the property they thus acquired, as was said in *Haberman v. Baker* (128 N. Y. 261), at once took on the character of the mortgage indebtedness, and was as personality in their hands, which they could dispose of and were liable to account for as such. (*Lockman v. Reilly*, 95 N. Y. 64.) This farm being assets in the executors' hands, it was their duty in the due administration of the estate to use reasonable diligence to so dispose of it that the proceeds could be seasonably distributed to those entitled thereto. Instead of selling this farm the executors rented it for two years, and then in effect traded it with one Adams for property in the city of Syracuse. The deed which they gave to Adams expressed a consideration of \$4,000, and in the deed which Adams gave them the consideration was stated as \$7,000, but this latter transfer was subject to a mortgage of \$3,200. No money passed between the parties on account of their transfers and the sole actual consideration was the reciprocal transfer of property from one party to the other. The property thus conveyed to them may be conveniently referred to hereafter as the Adams property.

Norman Hine, though not the sole acting executor, did in fact do practically all the business of the estate. The only business in connection with the estate that Allen Hine transacted, was, as Norman testifies, to sign the first check drawn on estate funds and execute the deed of the Stearns farm. No criticism whatever can be made on his conduct in this regard, for he had suffered a stroke of paralysis before this deed was given, and was thereafter until his death in October, 1899, in poor health. His coexecutor,

Norman, was at this time an attorney in good practice, who had acted as his father's attorney before the latter's death, and was apparently competent and trustworthy in every way. It was entirely natural and proper, therefore, that Allen should, as he did, leave the management of the business of the estate to Norman, and no breach of trust or negligent omission of duty as an executor can properly be charged to him because he did so.

The disposition which the executors made of the Stearns farm, to which reference has already been made, was not one which the law sanctions; and, unless the persons entitled to share in that portion of testator's estate either consented to the trade, or in effect subsequently ratified it, the executors were personally responsible to account for the value of the Stearns farm at the time it was conveyed in exchange to Adams. (*Garner v. Germania Life Ins. Co.* 110 N. Y. 267; *King v. Talbot*, 40 id. 76.)

The trial court has in this action fixed the value of this farm in one of the findings of fact at \$4,400, and in a subsequent finding at \$4,000, and has held the estate of Allen Hine responsible to the plaintiff for one-quarter of the latter sum, to which interest at the rate of six per cent from the date of transfer has been added. If it were necessary in determining the disposition of this case to pass upon the correctness of the court's finding as to the value of the premises and the proper rate of interest with which Allen's estate should be charged, we would be inclined to hold that both the value of the farm and the rate of interest fixed by the court were excessive. But the view we entertain as to this branch of the case does not involve a consideration of the value of the Stearns farm. The Adams property, which the executors took in exchange for the Stearns farm, instead of being sold by them, was rented until the foreclosure in 1901 of the mortgage, subject to which the premises had been conveyed to the executors. To this action the surviving executor, Norman, the representatives of the estate of Allen, who was then deceased, and the other residuary legatees and devisees of Josiah Hine, deceased, including Ambrose Hine, the plaintiff in this action, were made parties defendant. This foreclosure resulted in the production of a surplus of \$1,170.24, which was in due course paid into court. This present action, brought by plaintiff to compel the representatives of Allen's estate to account for and pay

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over to him, as one of the residuary legatees of Josiah Hine, one-fourth of the value of the Stearns farm, as of the date it was transferred to Adams, with interest thereon from that date, was begun on February 3, 1903. Seventeen days prior to the service of the summons in this action plaintiff assigned to General Hancock his interest in the surplus moneys which resulted from the sale of the Adams property. This transfer, which was for value, in writing, under seal, duly executed, acknowledged and delivered, in the language of the assignment transferred to Hancock "all my (plaintiff's) right, title, interest and claim, if any, which I may have in and to the surplus moneys arising out of the foreclosure sale, in the above-entitled action, authorizing said Theodore E. Hancock, as far as I am concerned, to collect the same. I distinctly state that I make no claim whatsoever to such surplus moneys or any part thereof; and further state that the property on which said mortgage was foreclosed was bought by Norman Hine and Allen Hine, or the title thereto was taken by them without my knowledge or consent." Pursuing the right to the plaintiff's share of the surplus, which this assignment gave him, the assignee received one-fourth of it, as directed by order of the court in surplus-money proceedings, duly instituted and concluded. If the plaintiff had himself received without protest this share of the surplus, which was his share as residuary legatee in the net proceeds of the Adams property, it is not questioned that he would have been bound by the election thus made, and could not maintain this action to recover his interest in the actual value of the Stearns farm at the time of the exchange; for he could not at the same time receive and enjoy the proceeds arising from the sale of the property, which, but for the transfer complained of, would never have existed, and hold the executors to account for the value of the property transferred, in exchange for which they have received the property from which these proceeds were obtained. (*King v. Talbot*, 40 N. Y. 90; *Fowler v. Bowery Savings Bank*, 113 id. 450; *English v. McIntyre*, 29 App. Div. 439, 448, 449.)

But it is urged that the plaintiff in his assignment expressly disclaims any interest in these proceeds, and, therefore, that the assignment was absolutely void. This can hardly be justly claimed to be the true effect of the assignment. It appears that plaintiff

was a party to this foreclosure action, and he must have had full notice of what its purpose was and of the property involved. He also knew that a surplus had resulted on the sale, and that he could collect his interest in it if he chose to do so. The apparent effort of plaintiff, who was at the time the assignment was made doubtless intent on bringing the present action, which he began less than three weeks thereafter, was to so frame the terms of the assignment as to disaffirm any express or implied ratification of the exchange of the Stearns farm and at the same time authorize his assignee to collect his share of the surplus. To give to the assignment, which has been acted on, and pursuant to which the share of the surplus, thereby assigned, has been paid over to the assignee, the effect which it is now urged it should receive, would be manifestly unjust and inequitable. The plaintiff could, if he chose, have declined to recognize the exchange of the Stearns farm as binding upon him in his assertion of interest in that portion of the estate which the farm then represented, and have rejected his apparent interest in the surplus moneys. He could on the other hand have ratified the exchange by accepting his share of the proceeds of the property for which the farm had been traded. But he could not at one and the same time give power and authority to his assignee to collect, as owner, his share of the surplus moneys, and also urge that, because he assigned only his "claim, if any," and did not in terms ratify the exchange, he expressly disaffirmed the exchange by stating in the assignment that he made no claim to the money and that the property was bought and title taken without his consent. Plaintiff had a valid claim to share in this surplus, if he chose to assert it. By the assignment he asserted that claim, because in terms he thereby transferred his "claim, if any," and authorized his assignee to collect it. He had no claim in the surplus to assign unless he ratified the action of the executors in making the exchange of property. He had an interest if he did; and the fact that he assumes to assign whatever claim he had in the surplus, if any, necessarily, it would seem, gives to the assignment the effect of a ratification, else nothing passed by his transfer of his claim for which he had received from his assignee a valuable consideration. Plaintiff having by the assignment authorized his assignee to collect the share of the surplus to which if plaintiff had elected he would

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have been entitled, if the assignment had not been made, it seems that he must be held equally bound by his assignee's receipt and acceptance of this share of the surplus as he would have been had he himself received it.

It follows that neither the surviving executor nor the estate of the deceased executor is chargeable as to this plaintiff with any sum whatever as plaintiff's share or interest in the Stearns farm or the proceeds or value thereof.

There remains for examination only the affirmative defense by way of counterclaim, which the defendant representatives of Allen Hine, deceased, have interposed to plaintiff's complaint. This is based upon the following facts: Josiah Hine at his death owned two mortgages given by one Barker, securing the aggregate principal sum of \$10,000. Before the death of Allen Hine his coexecutor, Norman, had begun proceedings to foreclose these liens. Both executors were named as plaintiffs in this action, though there is no proof that Allen was ever consulted in reference to the claim, or knew anything of the foreclosure. Instead of completing the foreclosure by a sale of the premises covered by the lien of the mortgages, under an arrangement made with the mortgagor the property was conveyed by him directly to Norman and Ambrose Hine; and Norman Hine, after the death of Allen, discharged, as executor, the two Barker mortgages. Norman and Ambrose Hine leased and managed these premises for some years after they were transferred to them and together gave a mortgage on them for \$1,000, the proceeds of which were received by Norman, personally. They afterwards sold the premises for \$8,000, which was paid and secured to be paid by the purchaser assuming the payment of the \$1,000 mortgage, paying \$1,000 in cash, which Norman received, executing a mortgage for \$2,000 to Ambrose, and another mortgage for \$4,000 to the same person. It was understood between Norman and Ambrose that these amounts of cash and securities should be considered as representing the several shares in the \$8,000 purchase price of the premises, to which the four legatees were entitled. Norman's share was provided for by the proceeds of the first mortgage for \$1,000, already received by him, and the \$1,000 in cash received on the sale of the farm. Ambrose's share was taken care of by the \$2,000 mortgage given to him, and Mrs. Huntington's share and the share

of Allen's estate made up the sum secured by the \$4,000 mortgage to Ambrose. This \$4,000 mortgage was taken in the name of Ambrose, as he asserts, without his knowledge, and was in fact after he began the present action assigned by him to Norman. Norman at once used the security to procure a personal loan to himself; and the persons for whom this security was intended have been compelled to advance the amount for which he assigned this mortgage as collateral to his personal obligation, in order to procure a transfer of the securities to themselves. If the representatives of Allen's estate had been content simply to assert the claim that the \$4,000 mortgage was taken by plaintiff for their benefit to be accounted for to them by him, either by transfer of the security or collection and payment to them of the proceeds, we would be constrained to hold that plaintiff took that security in trust for their benefit, and, having assigned it to Norman, is liable to account to the representatives of Allen for the amount necessarily expended by them in recovering the portion of the security to which, in that event, they would be entitled. But they have chosen, as appears by the evidence, to compel Norman, the surviving executor, to account in Surrogate's Court for testator's estate with which he is chargeable. We have before this called attention to the fact that the *cestui que trust* is at perfect liberty to elect to approve an unauthorized investment and enjoy its profits, or to reject it at his option. But, as we have already said, he must elect whether to affirm or disaffirm the unauthorized investment, and having once made his election it is conclusive of his further action in relation to that investment. The representatives of the deceased executor, Allen, therefore, had the choice presented to them, either to accept the one-quarter interest in the amount for which the Barker property was sold by Norman and Ambrose, or to hold the surviving executor, Norman, responsible for the full amount with which he was properly chargeable, as the amount he should have collected on the Barker mortgages in the due administration of the estate. They chose the latter course; and in the accounting have obtained a decree, by which the executor Norman is charged with the full amount of the principal of these mortgages and interest thereon, amounting to \$12,777.75. They have thus clearly made their election of remedies and cannot now insist that plaintiff shall be held responsible



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for the proceeds of the sale of this property, for which he otherwise would be necessarily bound to account as trustee of a constructive trust.

The judgment appealed from should be reversed and new trial granted, with costs to appellants to abide the event.

All concurred, except SPRING, J., who concurred except as to the last proposition discussed in the opinion.

Judgment reversed and new trial ordered, with costs to the appellants to abide the event.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM DIXON, Appellant.

Fourth Department, March 13, 1907.

**Crime — burglary, third degree — evidence — errors in admission of evidence and comment by court.**

On the trial of an indictment of burglary, third degree, it is error to allow a witness who aided in the burglary to testify that he and the defendant committed other burglaries wholly disconnected with the crime in question.

Evidence of conversations between the defendant and the witness relating to other unconnected burglaries is not admissible to show an unlawful purpose.

When the district attorney has stated before the jury that the defendant's attorney had made improper remarks and that the law which throws a mantle of protection around the defendant sometimes works injustice, it is prejudicial to the defendant for the court to emphasize the district attorney's remarks by stating that the defendant's counsel, if dissatisfied, has an objection and exception thereto.

So, too, it is prejudicial for the court, when the jury has been out all night without being able to agree, to state that if agreements cannot be had in that county it does very much to cause unrest in the administration of the law.

ROBSON, J., dissented.

APPEAL by the defendant, William Dixon, from a judgment of the County Court of Onondaga county, rendered on the 4th day of May, 1906, convicting him of the crime of burglary in the third degree, and also from an order bearing date the 4th day of June, 1906, and entered in the office of the clerk of the county of Onondaga, denying the defendant's motion for a new trial.

*Harley J. Crane*, for the appellant.

*William L. Barnum*, *District Attorney*, for the respondent.

KRUSE, J.:

Substantially the only evidence which tends to implicate the defendant in the commission of the burglary of which he was convicted is that of the self-confessed criminal who claims that he aided the defendant in committing the crime, and another who claims to have received from the defendant certain articles under the belief that they had been stolen. Such of the stolen property as was recovered was found in the possession of the person who admitted committing the burglary at the time he was arrested. And there is no evidence that the defendant ever had it in his possession or was in any way connected with the crime, save that furnished by the two men above referred to.

The defendant gave evidence tending to show that he was attending a theatre in the city of Syracuse on the night when the crime was committed, and at a time when, if the testimony given on his behalf is true, he could not have been engaged in committing the burglary. Six witnesses also testified to his good character. He lived in Syracuse, where the trial occurred. Only two witnesses were called to controvert that fact. The defendant had been tried before on this same charge, and the jury had disagreed, and upon this trial the jury were out all night and unable to agree until the trial court urged upon them the necessity for reaching a conclusion, which will be adverted to later.

It will thus be seen that the case for the prosecution was close at best. We think that such errors were committed upon the trial as requires us to set aside the judgment of conviction and remit the case for a new trial.

1. It was improper to show by the witness Austin, who testified that he aided the defendant in committing the burglary in question, that he and the defendant had committed other burglaries at other times, and wholly disconnected with the crime for which the defendant was on trial. It is true that as regards the Elbridge post office burglary the answer of the witness was stricken out and the jury instructed to disregard it. Very likely the error was cured so far as it could be by the instructions of the trial judge, but it was

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improper to get this fact before the jury. It does, however, appear that similar testimony was given by this same witness, over the defendant's objection and exception, relating to the Centerville post office. The witness was permitted to give a conversation between himself and the defendant which occurred after this burglary for which the defendant was being tried, the evident purpose of which was to show that the defendant attempted to persuade the witness to assist him in robbing the post office. The trial judge received the evidence, not as proof of the commission of the crime in question, but, as he stated, to show an unlawful purpose. We think it was incompetent for any purpose and should not have been received.

After the defendant had rested, the district attorney called the father of the defendant who had been a witness for the defendant on the former trial, but was not called by him on this trial. Just what the purpose of the district attorney was in calling him is not apparent, unless to show that he had been untruthful on the former trial. The only material testimony he elicited from the witness was that which tended to show that the defendant was at home on the evening in question when the burglary was committed instead of being at the theatre as he claimed. If it was thought material to show that fact, the attention of the witness, if unwilling or adverse to the prosecution, might have been called to his former testimony upon that point, but there was no justification for getting before the jury his testimony on the former trial and subjecting him to a severe cross-examination for the purpose of discrediting him, for by calling him the district attorney vouched for his credibility.

2. During the summing up the trial judge seems to have been momentarily absent, and the counsel for the defendant and the district attorney seem to have had some controversy, the district attorney claiming that the counsel for the defendant made some improper remarks. Just what was said and all that was said the record does not disclose, but the trial judge stated that apparently things were said that should not have been said. The controversy was to some extent continued in the hearing of the trial judge, the district attorney saying among other things that the law of the case and the suggestion of reasonable doubt and every other mantle of protection thrown around the defendant sometimes works an injustice

to the cause of right and that it was apparently so doing in this case. The defendant's counsel stated that the remark was objectionable and the court thereupon emphasized what the district attorney had said by stating that the defendant had an objection and exception. We think that this was prejudicial to the defendant.

3. After the jury had been out all night and unable to agree, further instructions were given them. While the presiding judge was careful to say to the jury in the beginning that he did not desire to influence the individual opinion of any juror we fear what was said later on did have precisely that effect. After calling the attention of the jury to the fact that the case had been tried once before; that two witnesses were in custody; that the jury had probably gotten all the light that could be given to any jury, and that if the defendant was innocent he ought to go free, the judge said: "Next to not having any courts at all in time it would be almost equally subversive of the administration of justice if time after time juries will not agree. The occasional disagreement, that is nothing; that is an incident to the system, but if we cannot get agreements in Onondaga County, it certainly does very much to cause unrest in the administration of the law. Now, with these suggestions, gentlemen, you may retire."

The jury may well have received the impression from these remarks that a failure upon their part to agree upon a verdict was a reflection both upon their intelligence and their integrity, and we cannot say that the case was so plain against the defendant that he was not prejudiced thereby. We think that under the circumstances of this case the errors to which we have called attention require the granting of a new trial.

The judgment of conviction and the order denying the motion for a new trial should, therefore, be reversed and a new trial granted.

All concurred, except Robson, J., who dissented.

Judgment of conviction reversed and a new trial ordered.

MICHAEL J. FARRELL, Respondent, v. THE CITY OF BUFFALO,  
Appellant.

Fourth Department, March 20, 1907.

**Municipal corporations — when laborer in street department not entitled  
to recover wages as foreman.**

Action to recover additional compensation for services alleged to have been rendered by the plaintiff to a municipal corporation as foreman in the street cleaning department.

It appeared that the plaintiff was employed as a laborer in the street cleaning department at a wage of one dollar and fifty cents per day; that being unable to do hard manual labor by reason of his age, he was at certain times on his own solicitation allowed to act as foreman in charge of a certain number of laborers. The plaintiff was never appointed as foreman nor given a foreman's badge and performed his duties under the instructions of regularly appointed foremen. It further appeared that without protest or complaint he gave receipts in full payment for services as laborer during the entire time he was employed. On all the evidence,

*Held*, that the plaintiff was not entitled to recover any sum in addition to laborer's wages received, for to hold otherwise would establish a dangerous precedent in that any municipal employee performing the duties of a higher rank for a day or week might claim additional compensation no matter what the agreement with the corporation;

That the plaintiff by accepting and receipting for his wages without protest had waived his right, if any, to increased wages.

Cases collated and discussed.

ROBSON, J., dissented.

APPEAL by the defendant, The City of Buffalo, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 16th day of March, 1906, upon the report of a referee.

The action was commenced on the 15th day of June, 1903, to recover additional compensation for services alleged to have been rendered by the plaintiff as "foreman" in the street department of the defendant from the 28th day of December, 1899, to and including the 2d day of February, 1902, during which time the plaintiff was paid the regular wages of a "laborer" and receipted for the same at the end of each week.

*Samuel F. Moran, Alexander Davidson and Louis E. Desbecker,*  
for the appellant.

*Edward N. Heath,* for the respondent.

McLENNAN, P. J. :

For the purposes of this review it will be assumed that the findings of fact made by the referee are supported by evidence, and only such other facts as are not controverted will be considered.

In March, 1899, the plaintiff was employed as a laborer by the defendant in its street department at a wage of one dollar and fifty cents per day, and from that time until about the twenty-eighth day of December following he worked as such and received the wage fixed therefor; but during a considerable portion of that time, at his request and solicitation, he acted in the capacity of boss or foreman, and thus was relieved from doing hard manual labor, which he was unable to do on account of his age (sixty years) and his enfeebled physical condition.

At about the date last mentioned the plaintiff had the following conversation with the superintendent of defendant's street department. The plaintiff said: "I have had some experience in this work now, and if you need any more foremen I think I could handle a gang of men." The superintendent said: "Do you think you can, Farrell?" Plaintiff said: "Yes, sir, I will try it any way," and the superintendent replied: "All right, I guess we will need you."

After that conversation the plaintiff was frequently put in charge of a gang of men by one of defendant's inspectors and foremen who were sent to different parts of the city to perform certain specified work. During all the time in question such men were assigned to the plaintiff by a regularly appointed inspector or foreman and such work was done under their general directions and supervision. That continued until the 2d day of February, 1902, being 641 working days, and which is the time for which the plaintiff has been awarded one dollar per day additional pay. During all that time, as found by the referee, "the plaintiff performed the duties of foreman in the street department of the defendant, with defendant's knowledge and acquiescence." During this time foremen in the department were regularly appointed, were designated as such and their wages had been duly fixed at two dollars and fifty cents

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per day. Each foreman appointed was provided with a gold plated badge upon which was the word "foreman" which he wore when on duty. To each of them was assigned such number of laborers as they required, who were subject to their direction and control and the name of each was kept by such foreman in a book furnished to him by the department. Each was provided with a blackboard in the superintendent's office on which they wrote or posted instructions for the guidance of the men assigned to them respectively. The foremen were all carried upon the payrolls of the department as such and were paid the wages fixed for the persons appointed to such positions.

The plaintiff was never appointed foreman, nor in any manner designated as such. No one representing the defendant ever hired him as foreman or agreed to pay him a foreman's wages; he was not furnished a foreman's badge, but a laborer's badge, which he wore during all the time he was in defendant's employ; he was at all times carried upon the payrolls as a laborer, was assigned to one or the other of the regularly appointed foremen as such, and was subject to their orders. They, the other foremen, told him what to do and he did it. He reported to them and not to the superintendent or head of the department as they did. He was not furnished with a blackboard in the superintendent's office to enable him to give orders and directions to the men, and during the entire time he was only paid a laborer's wages, viz., nine dollars per week, which he received each Saturday and accepted in full payment of the services rendered. He accepted such wages without protest or complaint, except that he stated from time to time that he ought to have more or that he was not receiving enough, but kept right on accepting laborer's wages and each week receipted in full for the same with full knowledge of all the facts. He knew what a laborer's wages were and that he was receiving the same; he knew what a foreman's wages were and that he was not receiving such wages; he knew that he had asked for foreman's pay and it had been refused; he knew that he was not regarded as a foreman and that the defendant did not understand or expect that he was to receive a foreman's pay.

Under such state of facts we think the plaintiff is not entitled to recover any sum in addition to laborer's wages, which, concededly, he has received and receipted for.

To hold that the plaintiff, under such circumstances, is now entitled to recover foreman's wages would establish a most dangerous precedent. If such is the law, a municipality can never know the extent of its obligations to its employees. The number of foremen may be indefinitely increased without any formal action; a receipt in full for services rendered would be of no avail and even an agreement to work for a specified compensation would afford no protection.

If respondent's contention is correct, perchance a common laborer performs duties similar to those of another employee of higher rank for a day or a week, with the consent and acquiescence of the municipality, there is no way to avoid the payment of the higher wages, no matter what the agreement or understanding between the parties.

The plaintiff, under the facts disclosed by the record, has waived all right which he may have had to compel the defendant to pay him foreman's wages.

In *Ryan v. City of New York* (177 N. Y. 271) the court said: "Now, 'it is well settled by authority that a man may waive any right that he has, whether secured to him by contract, conferred on him by statute or guaranteed him by the Constitution.' \* \* \* And the legal effect of plaintiff's action in accepting from time to time during a period of six years, without protest, the wages paid to him by the city was to waive any claim that he might have had at the time to insist that the employing officer should fix his rate of compensation at a greater sum than he did."

And in a concurring opinion by Judge O'BRIEN he said (p. 280): "When a servant sues the master for wages, alleging that he worked by the day for more than six years, and was paid for each day's work at the rate of three dollars per day, and makes no claim or allegation that he ever asked any more, or ever objected on the ground that he had not been paid enough, or that he reserved the right to demand more in the future, or that there was fraud or mistake in the dealings, the legal conclusion from the facts must be that there was a full settlement between the parties or an agreement as to the rate of wages, or a waiver of any other claim. (*McCarthy v. Mayor, etc., of N. Y.*, 96 N. Y. 1.) I understand that there is no difference of opinion in this court on this point, and if not, then



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the case is decided and it is not necessary to discuss the validity of the Labor Law.”

We think this court has construed the law adversely to respondent's contention in *Matter of Burns v. Fox* (98 App. Div. 507), in which it was said: “If we should assume, however, that as an original proposition relator was entitled to demand the compensation of two dollars per day allotted to him for a day consisting of only eight hours, we think he has waived and lost his right to extra compensation for additional hours.

“Whatever penalty might be visited upon the employer seeking to violate the act in question, the relator undoubtedly had the right, if he saw fit, to waive the statutory provisions enacted for his benefit, and we think that his receipt for his wages for a period of over four years, without objection to what he now claims were excessive hours, or claim to extra compensation therefor, amount to such waiver. (*Ryan v. City of New York*, 177 N. Y. 271.)”

In *Hobbs v. City of Yonkers* (102 N. Y. 13) the plaintiff agreed in writing that if he were appointed treasurer of the defendant he would pay into the city treasury all fees and percentages received by him as such treasurer in excess of \$2,000 per annum, and thereupon he was appointed and qualified and acted as such treasurer. By the law under which he was appointed he was entitled to one per cent on all payments made by him. Each year the plaintiff rendered an account of his receipts, retaining \$2,000 as his salary, and paying the surplus into the city treasury. Upon this basis his accounts were adjusted, he making no claim for any further compensation during his entire term, and at the close of his term rendered his final account as treasurer and paid over to his successor the balance remaining in his hands. The court held that while the common council had no authority to change the compensation of the plaintiff which was fixed by law, and the agreement to that effect was inoperative for such purpose, yet the plaintiff had a right to release the city from all claims for services beyond the amount agreed upon, and that the accounts presented and settled were essentially accounts stated, and as such could not be disturbed except by action in equity for that purpose.

*Drew v. Mayor* (8 Hun, 443) was an action brought to recover the amount of certain balances claimed to be due on account of the

monthly wages of the plaintiff as sweeper of the public markets of the city of New York. The rate of wages originally fixed by ordinance of the defendant was sixty dollars per month. The plaintiff received sixty dollars per month for such services for a time. Thereafter he was only paid fifty dollars a month for the same services, but at the time of each payment he signed a payroll containing a receipt in full. It was held that the plaintiff was not entitled to recover. The court said: "He (the plaintiff) proved that in 1866 the common council passed a resolution fixing the compensation of sweepers employed in the markets at sixty dollars per month, and that in 1867 the then comptroller, Conolly, directed him to go to work as such sweeper, and that he was paid, for a certain period, at the rate of sixty dollars per month. This showed an implied contract to pay him at that rate. But the plaintiff further showed that he was subsequently paid at the rate of fifty dollars per month, and that from month to month, for the whole period covered by his claim in this suit, he signed monthly receipts contained in the pay roll of the bureau of markets, in which his wages were set down at \$600 per annum for his services as sweeper, and acknowledging the receipt from the comptroller of fifty dollars in full payment for services rendered by him in the capacity of sweeper for the period of the month embraced in each pay roll. This certainly overcame the presumption of a contract to pay sixty dollars for the same period, and showed, by strong inference at least, a contract for fifty dollars per month, or rather at \$600 per annum, payable monthly. The plaintiff was an illiterate man, and signed the pay roll by making his mark, but he knew what amount of money he got, and that he gave a monthly receipt, and he made no demand for more, but went on working and receiving that sum, and signing such receipts during the whole several months covered by his complaint. His assent to the price and terms must be assumed, under such a state of facts, on the production of monthly receipts in full, each stating the rate of compensation per year and the amount per month at such rate. The court was clearly right in directing a verdict (for the defendant) upon such a state of facts."

In the case of *Wilson v. City of New York* (31 Misc. Rep. 693) it was held that where a clerk in the health department of the defendant city accepted and receipted for a lower salary than that

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designated by the head of such department, under a claim upon the part of the city that the payment was in full, such clerk could not subsequently recover of the city the amount of the reduction.

We think the cases cited by the respondent are not in conflict with those above referred to. *People ex rel. Satterlee v. Board of Police* (75 N. Y. 38) simply held that a board of officers having the power of appointment to an office cannot reduce the amount fixed by law as the salary of such office or make a binding contract with their appointee to perform the duties of the office at a less sum.

In that case the salary of the relator was fixed by statute, and it was held that the police board had no power to reduce such salary or to compel the relator to receive a less sum than was provided for by statute, and also that the acceptance and discharge of the duties of such an office after appointment is not a waiver of a statutory provision fixing the salary thereof.

The case of *Kehn v. State of New York* (93 N. Y. 291), also cited by the respondent, is clearly distinguishable from the case at bar. In that case it was held that "where the compensation of an employe of the State is fixed by statute it cannot be reduced by the State officer under whom he is employed." The court said that he was not estopped from claiming the full compensation by the fact that he took the reduced pay for a portion of the time without objection, but that he was entitled to recover the difference.

The respondent insists that this court has decided the precise question involved, in accordance with his contention, in the case of *Schmitt v. City of Buffalo* (48 App. Div. 634). That case was decided without opinion, and while in many of its features it was similar to the case at bar, there is this important distinction in the facts: In that case the referee found that the plaintiff did not know that his name was being carried upon the payroll as a laborer, and did not know that the services of assistant foreman had been fixed at two dollars and fifty cents per day when he received and receipted for the smaller wages. It was, therefore, properly held that the plaintiff in that case, not having knowledge of the essential facts, his acts in the premises did not constitute a waiver. At all events, in so far as the decision in the *Schmitt* case is in conflict with the decisions above referred to, it should be considered as overruled. I more readily reach such conclusion because

fully convinced that the rule contended for by the respondent would lead to the greatest abuse and open the way for "graft," favoritism and speculation in the administration of the municipal governments of the State. There ought not to be any misconception as to the importance of the questions involved. A municipality under the provisions of the law employs and fixes the wages of its common laborers, and also employs and fixes the compensation of its foremen, inspectors, superintendents and other like employees. It seems to me a dangerous proposition that a laborer may perchance voluntarily and from choice perform the duties of one or the other of the classes of employees whose compensation is greater than his without any appointment or designation to such position, continue to receive the wages of a laborer for the services rendered without protest or complaint, except to say that he thinks he should have more, and after he is discharged from the employment of the municipality recover from it the same compensation which he would have been entitled to receive had he been regularly appointed to such higher position, and that by accepting and receipting for the lesser compensation with full knowledge of all the facts, he does not waive his right to recover the greater compensation. I think the proposition is not sound; that it is not founded in justice and is not the law. If the plaintiff had for a week performed the duties of a superintendent of defendant's street department, pursuant to an arrangement between him and such superintendent, with equal force could he claim that he was entitled to receive a superintendent's salary. A common laborer, who is hired to work for a city for one dollar and fifty cents per day, cannot become foreman, inspector or superintendent, and thus entitled to receive double or perhaps triple wages, simply by the performance of the duties of such position; but, in any event, where he settles and receipts each week or month for the services rendered, he cannot compel the payment of additional compensation.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred, except Robson, J., who dissented.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

JOHN W. FORD, Suing in His Own Behalf and in Behalf of All Other Creditors of the ROCHESTER-MEXICAN PLANTATION COMPANY, Respondent, v. BENJAMIN E. CHASE and Others, Appellants, Impleaded with FRANK A. UNDERWOOD and Others, Defendants.

Fourth Department, March 6, 1907.

**Debtor and creditor — suit in equity by creditor against stockholders for unpaid subscriptions — defaulting subscribers not necessary parties — sufficient allegation of promise to pay for stock — when debt of corporation payable within two years — failure to bring suit excused by injunction — when legal action not prerequisite to suit in equity.**

In a creditor's action against stockholders of an insolvent corporation to recover sums unpaid upon their stock subscriptions, subscribers who never paid the ten per cent essential to make them stockholders are not necessary parties.

Neither is it necessary to join subscribers whose subscriptions have been declared forfeited by resolution of the board of directors.

A complaint excusing the joinder of parties whose subscriptions are forfeited need not allege the details essential to the declaration of forfeiture by the directors pursuant to section 43 of the Stock Corporation Law, such facts being merely evidential.

When the creditor alleges that the entire capital stock was subscribed and that the several defendants named subscribed for and agreed to take shares of capital stock as specifically set forth and that certain specified sums on the subscription are due and unpaid by each defendant respectively, there is a sufficient allegation of an agreement to pay, and the complaint is not open to the objection that part of the stock may have been paid for in property or labor.

When a corporation assumes the contract of a vendee of lands and agrees to pay the consideration to the vendor, it assumes the debt and becomes the debtor of the vendor within the purview of section 54 of the Stock Corporation Law.

Although by section 55 of the Stock Corporation Law a stockholder is not personally liable for debts of a corporation not payable within two years from the time contracted, nor unless an action for collection shall be brought within two years after the debt becomes due, yet when in 1903 a corporation assumed the obligations of a vendee under a contract to sell lands made in 1902, the consideration to be paid in 1904, the liability of the corporation for the debt matures within the statutory period, for the agreement assuming the debt is an independent agreement creating a new obligation. The purpose of the statute is to prevent the extension of credit to a corporation for a longer period than two years and should not be so construed as to include the time a debt was running preceding the date when the corporation assumed it.

A failure to bring suit against stockholders within two years as required by said section 55 is excused when all actions were enjoined on the appointment of a receiver.

When a complaint in a creditor's action alleges the insolvency of the corporation, its dissolution, the conversion of its assets into money and the inadequacy of the same to pay the debts, it is not necessary for the creditor to exhaust his legal remedy against the corporation.

McLENNAN, P. J., dissented.

APPEAL by the defendants, Benjamin E. Chase and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 1st day of September, 1906, upon the decision of the court, rendered after a trial at the Monroe Special Term, overruling the said defendants' demurrers to the complaint.

*M. H. McMath*, for the appellants Perkins and others.

*John P. Bowman*, for the appellants Chase and others.

*William N. Cogswell*, for the appellants Devine and McPhail.

*Edward Lynn*, for the respondent.

SPRING, J.:

The action is commenced by the plaintiff in his own behalf and all others similarly situated as creditors of the Rochester-Mexican Plantation Company, a domestic stock corporation, to recover of the stockholders of such corporation sums alleged to be unpaid on their stock. The action is in equity, and the stockholders and receiver of the corporation are made parties defendant. Section 54 of the Stock Corporation Law (Laws of 1892, chap. 688, as amd. by Laws of 1901, chap. 354), which is the warrant for the action, so far as pertinent, is as follows: "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him."

The charge is that several stockholders have failed to pay in full their capital stock, and the complaint asks for judgment decreeing payment by these delinquent stockholders, and for the adjustment of the claims of the creditors of the corporation and for the payment of the same in full, or ratably if the fund thus created is inadequate to pay them in full.

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In this form of action and under the amended statute (*supra*) all the stockholders should be made parties (*Lang v. Lutz*, 180 N. Y. 254, 259, affg. 83 App. Div. 534), and the judgment inures to the benefit of all other creditors who prove their claims and contribute their proportion to the expenses of the litigation. (*Matter of Ziegler*, 98 App. Div. 117.)

The stock subscribed and issued is the fund to meet the obligations of the company and in equity is subject to the lien of the creditors; "unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it." (*Stoddard v. Lum*, 159 N. Y. 265, 273.)

Demurrers to the complaint were interposed by all the defendants served, alleging that there is a defect of parties and that a cause of action is not set forth.

We will briefly analyze the chief features of the complaint.

The Rochester-Mexican Plantation Company was organized in November, 1901, for the purpose of buying, selling and operating plantations in the Republic of Mexico, with an authorized capital of \$60,000, divided into shares of the par value of \$25 each. At the time of the organization of said corporation the plaintiff owned a tract of land in the State of Vera Cruz in said Republic, and on the 8th day of March, 1902, sold the same to one Zeeveld who agreed to pay the plaintiff as part of the purchase price \$9,000 in American gold, with interest, on the 8th day of March, 1904. The corporation, it seems, assumed possession of these premises at the time of the purchase by Zeeveld, who was one of the original subscribers for the stock of said company. On the 6th day of February, 1903, Zeeveld sold the premises to the plantation company, and as a part of the purchase price it assumed and agreed to pay the said indebtedness of \$9,000 to the plaintiff. The complaint alleges that the defendant stockholders have failed and omitted to pay in full for the stock severally subscribed for and taken by them, and the extent of the delinquency of each shareholder is set out in the complaint and nothing has been paid to the plaintiff on the assumption agreement.

One criticism of the pleading is that certain of the original subscribers to the stock are not made parties. The complaint in excuse for this alleged failure avers that while these stockholders subscribed

for the stock they never paid the ten per cent thereof essential to make them stockholders. (Stock Corp. Law, § 41.)

They are not necessary parties. (*Perry v. Hoadley*, 19 Abb. N. C. 76; *Black River & Utica R. R. Co. v. Clarke*, 25 N. Y. 208, 210.)

Four of the stockholders who subscribed for \$250 each of the capital stock are not made parties. In explanation of this omission the complaint alleges that these stockholders "released The Rochester-Mexican Plantation Company from all obligations on account of said stock subscription and the payment of the said sum of Two Hundred and Fifty Dollars, and by a resolution of the board of directors of the said The Rochester-Mexican Plantation Company the stock of the said Frederick P. Allen, Josiah Anstice, E. Frank Brewster, and Edward G. Miner, Jr., was declared duly forfeited."

The sufficiency of this allegation is challenged on the ground that it does not recite the details essential to the declaration of forfeiture by the directors pursuant to section 43 of the Stock Corporation Law. (Laws of 1892, chap. 688.) This is not necessary. The general fact is stated denoting the cause for the omission to make these people parties defendant, and the gist of the statute is embodied in this recital. If not sufficiently explicit the remedy is by motion to make the averment more definite and certain, rather than by demurrer. It is not necessary to plead evidentiary facts leading up to the resolution declaring the stock forfeited. (*Rochester R. Co. v. Robinson*, 133 N. Y. 242.)

The subscribers whose shares of stock were forfeited ceased to be stockholders. (*Mills v. Stewart*, 41 N. Y. 384; *Wheeler v. Millar*, 90 id. 353, 358.)

It is also claimed that the foundation of the stockholders' liability to pay the unpaid stock rests in the agreement to pay, and that there is no allegation of a promise to pay beyond the sums already contributed. We think the complaint is ample in this respect. It first alleges that the entire capital stock was subscribed for in shares of twenty-five dollars each. It then charges that "the several defendants herein named \* \* \* subscribed for and agreed to take shares of the capital stock of said The Rochester-Mexican Plantation Company, as follows: Benjamin E. Chase, forty shares thereof, of the par value of One thousand dollars;"



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and a like statement as to the number of shares subscribed for and agreed to be taken by each defendant. It then recites the sum paid by each shareholder "on account of said shares of stock subscribed for as above set forth the sum of (stating amount) due and unpaid of the par value of said stock of each of said defendants respectively."

In the 11th paragraph it is alleged, "That the several defendants herein (other than the defendant Fanning) and said W. A. Nason and T. J. Oliver held and owned said stock at the time the debt to plaintiff on which this action is brought was contracted and up to and at the time of the final dissolution of said The Rochester-Mexican Plantation Company, and held and owned such stock at the time of the commencement of this action." And further it sets forth the names of the stockholders claimed to be derelict, with the number of shares and the balance remaining unpaid.

The general allegation is contained in the complaint that "no other person or persons held capital stock of the said The Rochester-Mexican Plantation Company which was not fully paid at the time of the final dissolution of said corporation, who held such stock at the time the debt to plaintiff on which this action is brought, was contracted."

These allegations, if true, show the subscription for and the ownership of the stock and the agreement to pay twenty-five dollars for each share subscribed for. A fair construction of the complaint negatives the suggestion that a part of the stock may have been paid for in property or labor.

It is urged with much earnestness that the assumption of the purchase price of \$9,000 for these premises due from Zeeveld was not a debt within the purview of section 54. The plaintiff was a creditor of Zeeveld. The latter did not give back a mortgage to secure the purchase price of this land, but gave his individual obligation to pay, thus creating the relation of debtor and creditor. When the corporation assumed and agreed to pay this debt it became the debtor of the plaintiff. He could enforce the payment of this debt by action against the company, and it was like any other obligation, and the land purchased was an asset of the company denoting the consideration for the indebtedness.

Section 55 of the Stock Corporation Law contains the following

provisions: "No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due."

The agreement between Zeeveld and the plaintiff was made March 8, 1902, and the \$9,000 were to be paid March 8, 1904. The agreement whereby the plantation company purchased the premises and undertook to pay the debt bears date February 6, 1903. It is claimed that inasmuch as the original debt ran for a longer period than two years (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54; *Ryer v. Prudential Ins. Co.*, 185 id. 6; *Vose v. Kuhn*, 45 Misc. Rep. 455), the corporation was not liable to pay the debt at all. The corporation did not become bound until February, 1903. It was not the corporate debt until then, and it matured within fourteen months from the time the company became chargeable with the payment. The purpose of the statute is to prevent the extension of a credit to a corporation for a longer period than two years. The rule was not transgressed in the assumption of this debt. The contract with the corporation was an independent agreement, creating a new obligation on its part.

If the assumption had been after the debt had accrued there would have been no liability at all, within the rule sought to be applied by the counsel for the appellants, on the part of the corporation by its assumption of the debt. We think the policy of the statute is to limit the two years' restriction to the time from which the corporation can be held liable, and not to include the time when the debt was running preceding the date when the corporation became the debtor. The counsel for the appellants cites cases like *Hardman v. Sage* (124 N. Y. 25), where the time of credit was extended beyond two years by promissory notes given by the corporation, and the court held that the claim of the creditor could not be charged against the stockholder. In those cases more than the limited period ran against the corporation. In the present case there was no debt of the corporation which extended beyond the two years.

The action was commenced in January, 1906, so that more than two years elapsed after the assumption agreement and the commencement of the action. The complaint alleges that on the 18th of January, 1905, and within two years from the date of the liability

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of the company, a petition of the directors of the corporation was presented to the court for its dissolution, and an injunction order was granted that day enjoining all creditors from bringing any action against the company, and a temporary receiver was then appointed. The temporary injunction remained operative until July, 1905, when the company was declared insolvent and its dissolution was ordered and a permanent receiver appointed to wind up its affairs, and the creditors were permanently restrained from commencing any action, which order continued effective until the commencement of the present action. These facts sufficiently excuse the failure to commence the action within the two years from the inception of the liability of the corporation.

The complaint alleges, as already noted, the insolvency of the company, the dissolution proceedings, and also the conversion of its assets into money, the inadequacy of the same to pay its debts so that the recovery of a judgment against the corporation would have been fruitless, and was not a prerequisite to the maintenance of the action. (*Lang v. Lutz*, 180 N. Y. 254, 256.)

The interlocutory judgment should be affirmed, with one bill of costs to the respondent.

All concurred, except McLENNAN, P. J., who dissented.

Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over upon payment of the costs of the demurrer and of this appeal.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN SMILIE and Others, Appellants.

Fourth Department, March 20, 1907.

**Crime — grand larceny, second degree — evidence — erroneous admission of false money found in possession of defendants — objection, when sufficient.**

On the trial of an indictment for grand larceny in the second degree in stealing the plaintiff's money during a game of dice, it is error to admit in evidence "phony rolls" (rolls of paper surrounded by a genuine bill to simulate a roll of money) found in the defendants' possession three months after the alleged larceny.

An objection to evidence connecting the "phony rolls" with the defendants sufficiently apprises the trial court that the objection will be taken to the rolls and it cannot subsequently be maintained that no objection was taken.

Cross-examination by district attorney criticised.

ROBSON, J., dissented.

APPEAL by the defendants, John Smilie and others, from a judgment of the County Court of Erie county, rendered on the 6th day of July, 1906, convicting the defendants of the crime of grand larceny in the second degree.

*Rowland B. Mahany*, for the appellants.

*Daniel V. Murphy* Assistant District Attorney, and *Frank A. Abbott*, District Attorney, for the respondent.

SPRING, J. :

Webb was the only witness on behalf of the People of the commission of the alleged crime. He testified that while waiting for a train in the Erie railroad station in the city of Buffalo he was asked by the defendant Davis to go with him for a cup of coffee. They went together to a saloon, where they met the defendant Smilie. Davis produced a five-dollar bill and Smilie produced one of ten dollars to pay for the drinks which they had ordered, and the woman tending bar was unable to change either bill. In order to settle the question of payment among themselves, Davis and Smilie threw dice, Davis winning. Smilie stepped away from the bar and Davis induced Webb to participate in throwing dice upon the pretext that they would "have some fun" with Smilie, paying him back his money. Webb thereupon took from his pockets bills aggregating one hundred and thirty-nine dollars, and the men threw dice, Davis producing fifteen dollars. A jangle ensued and in the fracas Webb's money was taken from him.

Two witnesses, Gallagher and Mrs. Petzing, who was the woman tending bar, testified that the defendants were not the persons in the saloon with Webb, and the defendants also denied that they were there.

The alleged crime was committed on the 8th of March, 1906. The defendants were arrested three months later. Their trunks were searched and two packages resembling money, characterized as "phony rolls," were found in the trunks. These rolls were

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exhibited to the jury and received in evidence, and I think their reception was error and very prejudicial to the defendants. It is claimed that there was no objection taken to their reception. When the police detective was first testifying he stated that he searched the trunks in rooms occupied by the defendants, or some of them, and proceeded to disclose their contents, when the defendants' counsel objected, stating that there was no connection between these rolls and the commission of the crime charged three months earlier. The witness then stated that he found two rolls, and when it was attempted to prove where they were found, the defendants' counsel objected, and the objection was sustained. The witness testified in that connection that he found a card case containing a card and he sought to show what name was on the card, and objection was interposed, the counsel saying that it was not in evidence, and he objected to it when "offered in evidence upon the same ground as the former objection." The district attorney thereupon replied that he "would like to have the Court examine those and I am going to offer them," and the court suggested "you had better wait until you make your proof in regard to their occupying the room," and the district attorney adopted the suggestion of the court.

This colloquy indicated quite clearly that the district attorney intended to offer in evidence those rolls and the other articles, and also it was obvious that the counsel for the defendants expected to resist their reception.

Evidence was then given on behalf of the People tending to show that the trunks belonged to the defendants or some of them. The detective was then recalled and testified to unlocking the trunks and finding the two rolls which he held in his hand. Objection was then interposed by the defendants' counsel, and he said to the court that he would like to state his grounds and the court assented. The counsel stated his objections as follows: "*That it has not been shown by any testimony offered thus far that it was necessary or that any of these rolls were used in the commission of the crime, and they have no more right to offer them than that a gun was found in their trunk.*" It is most unfair to these defendants to exhibit these to the jury and say that these men are crooked. It is not any evidence to show that this crime was committed there. Robbery is the charge, and if they found anything that was used

there, then it might be proper testimony." The court overruled the objection and exception was taken, and the rolls were received in evidence without any other offer.

It is quite clear that the counsel for the defendants interposed his objection in anticipation of the offer of these rolls. The court so construed it and allowed him to state his objection upon that hypothesis. He was not stating grounds applicable to the place where these rolls were found, but to their admissibility. Both the court and the counsel understood that the introduction of these rolls would be objected to, and when counsel stated at length the grounds of his objection the court realized to what they related and overruled his objection and received the rolls without any distinct offer of them. The office of an objection is primarily to apprise the trial judge that the counsel objecting seeks to exclude the evidence offered, and also the grounds upon which he asks for a ruling in his favor. These objects were fully satisfied by the procedure referred to. It was obvious that the district attorney was proving a series of connected preliminary facts with a view to the offer of these rolls. The counsel made his objection to the preliminary question and the court permitted him to state his objections in detail, not to the antecedent question, but to the rolls themselves; and then without further preliminaries received them after overruling the objection to which the exception was taken. We think the objections were timely and apprised the court sufficiently of the precise point to which they applied. (*Church v. Howard*, 79 N. Y. 415, 419; *Matter of Eysaman*, 113 id. 62, 71.)

The rolls were not competent evidence. They were found in the trunk more than three months after the alleged offense for which the defendants were indicted. There was no possible connection between the rolls in the trunk, whether there for a good or bad motive, and the claimed larceny. Webb testified that at the time his money was taken from him Smilie had a roll, perhaps of money, but gave no explanation of its contents or appearance. There was nothing to indicate that it contained spurious currency. The rolls received in evidence were chiefly composed of paper covered with a genuine bill, and the term "phony rolls" signified a package of that description. In order to make such evidence admissible it must bear upon the offense charged.

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The rolls in the trunk in June did not tend to show that the defendants stole money from Webb in March previous. The evidence was of the most damaging character. The jury very likely reached the conclusion that the roll Smilie had in the saloon was identical with one of those found in the trunk, although there was an utter absence of proof of their identity or similarity. The district attorney was enabled to exhibit these rolls before the jury and charge defendants with the commission of the crime alleged because these rolls were in the trunks, although they may have been there for no dishonest purpose.

As was stated in *People v. Altman* (147 N. Y. 473, 477): "It is impossible to say that the defendant was not prejudiced by these papers admitted against his objection. The rule that an error committed upon a trial may be overlooked when the party complaining was not prejudiced thereby is only applicable in cases where the error could by no possibility have produced injury."

On the cross-examination of Smilie the following occurred: "Q. When you were arrested there was a man with the officer by the name of King? A. He said his name was Williams. He was not with the officer when I was arrested and he told me and the officer that his name was Williams. Q. He is the man who is referred to as the Englishman? A. Who has referred to him? I haven't. Q. You were accused by that man? By Mr. McIntyre: I object to that as manifestly unfair on the part of the District Attorney, and he knows it. Objection sustained. Q. Weren't you identified by him as one of the three men who got his money at Niagara Falls? By Mr. McIntyre: I object to that. The Court: No, no, Mr. Murphy, that is the same line of questions to which the court sustained counsel's objections."

The manifest purpose of this examination was to create the impression in the minds of the jurors that Smilie had stolen money from King, and the offense charged in the indictment was stealing money. This conduct was improper and the vice of the testimony was not cured by excluding the evidence. (*Manigold v. Black River Traction Co.*, 81 App. Div. 381.)

And the most vicious part of the examination was in the question put by the district attorney after the court had indicated clearly that this line of testimony was improper. The testimony of Webb,

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with his participation in the dice throwing, was not of the strongest probative force, and the defendants were entitled to a fair trial for the precise offense charged in the indictment.

The judgment should be reversed.

All concurred, except ROBSON, J., who dissented.

Judgment of conviction reversed and a new trial ordered.

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In the Matter of the Annual Election of the EMPIRE STATE SUPREME LODGE OF THE DEGREE OF HONOR, a Corporation, Appellant.

II. W. SEYMOUR and Others, Appellants; WILLIAM E. BELDEN and Others, Respondents.

Fourth Department, March 22, 1907.

**Insurance corporation — proceeding to set aside election of directors — power of court to review election — when by-laws fixing number of directors must be adopted by policyholders — parties — policyholder may contest validity of election — when notice of election insufficient to constitute estoppel — former directors hold over when election set aside.**

By virtue of section 209 of the Insurance Law every insurance corporation, other than secret fraternal societies, must, before the adoption of by-laws, cause the same to be mailed to the members and directors with a notice of the time and place when the same shall be considered. The policyholders have the sole power to adopt by-laws governing the number of directors or fixing their term of office.

Even such by-laws as may be adopted by the board of directors under section 29 of the General Corporation Law are not valid unless published at least once a week for two successive weeks in a newspaper in the county where the election is to be held and at least thirty days before such election as required by subdivision 5 of section 11 of the General Corporation Law.

It follows that the executive committee of a co operative assessment insurance corporation, reincorporated under section 206 of the General Insurance Law, cannot adopt by-laws fixing the number and term of office of directors without due notice to the policyholders, and directors elected pursuant to by-laws so adopted are not entitled to office.

Section 27 of the General Corporation Law, giving the Supreme Court power to review corporate elections, applies to corporations organized under the Insurance Law.



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Aggrieved policyholders seeking to set aside an election by a proceeding under said section are not required to give notice to all policyholders of the company. Notice to the corporation itself and the directors, the legality of whose election is challenged, is sufficient.

Policyholders are entitled to contest the validity of such election in a proceeding under section 27 of the General Corporation Law, and action by the Attorney-General under section 1948 of the Code of Civil Procedure is not necessary.

When the election attacked is wholly illegal and without authority the policyholders seeking to set it aside need not show that a different result will be had in the event of a legal election.

The publication of notice of the annual meeting of policyholders of such insurance corporation in its official journal, which makes no mention of the proposed election of directors, does not estop policyholders who fail to appear at the meeting.

When a co-operative insurance association, originally incorporated under chapter 175 of the Laws of 1883, reincorporates under section 206 of the General Insurance Law, its corporate entity is not changed; but it merely becomes entitled to the benefits and privileges of the latter act. Hence, by virtue of the provisions of section 23 of the General Corporation Law, when an election of directors is wholly void, the former board elected under the original act of incorporation holds office until successors are duly elected.

The court, in declaring an election of directors wholly void, will not continue the directors so elected in office until their successors are legally chosen.

APPEAL by the Empire State Supreme Lodge of the Degree of Honor, a corporation, and H. W. Seymour and others, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Chautauqua on the 28th day of February, 1907, in a proceeding instituted under section 27 of the General Corporation Law (Laws of 1892, chap. 687), declaring the election of the individual appellants as directors of the appellant corporation to be void and restoring the management of the affairs of said corporation to William E. Belden and others, as members of the executive committee thereof.

*Herman J. Westwood and Simon Fleischmann*, for the appellants.

*F. W. Stevens*, for the respondents.

Order affirmed, with ten dollars costs and disbursements, on opinion of WHEELER, J., delivered at Special Term.

All concurred.

The following is the opinion of WHEELER, J.:

WHEELER, J. :

The corporation was originally incorporated in the year 1886 pursuant to chapter 175 of the Laws of 1883, authorizing the incorporation of co-operative assessment associations. In January, 1906, it was reincorporated under the provisions of section 206 of article 6 of chapter 690 of the Laws of 1892, as amended, being the general Insurance Law. It had a constitution and by-laws governing its corporate action, which provided for its management by an executive committee, consisting of the president, vice-president, secretary and two members of the association elected at the annual meeting of the association each year, and these officers were by the same constitution to hold office until their successors should be elected or appointed. These officers were in control of the company's affairs at the time of the reincorporation of the association, and continued in control down to the 19th day of June, 1906, when a meeting was held, and the nine respondents in this proceeding were elected, or claimed to have been elected, directors of the association. Three of these gentlemen are claimed to have been chosen by the policyholders of the association as directors for one year, three for two and three for three years. These nine men thereupon took upon themselves the management of this association as such directors, and this proceeding is now brought by three policyholders of the association to review the election, and to oust the respondents, the contention of the petitioners being that the election mentioned was wholly illegal and void.

The declaration effecting the reincorporation of the association provided as follows :

"The mode in which the corporate powers of the said corporation shall be exercised will be pursuant to its constitution and by-laws and amendments thereto, by a body known and designated as the General Council, which shall be composed of the certificate or policyholders of the said corporation.

"At all times when said General Council shall not be in session the corporate powers of the said corporation shall be exercised by a board of directors chosen or elected by the General Council in such manner as shall be prescribed by the by-laws of the said corporation, which board of directors shall have and exercise the general control and management of the affairs and of the funds of said corporation," etc.

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The articles of incorporation, therefore, do not assume to provide for the number or the term of such directors, or the manner or time of their election, but remit all such particulars to by-laws of the corporation to be properly adopted by the association.

On the 15th of June, 1906, four members of the executive committee assumed to adopt a code of by-laws for the association, which by-laws provided for the election of nine directors for the terms named.

The petitioners, however, contend that the executive committee had no power or legal authority to adopt or prescribe by-laws for the association, either under the by-laws as they existed prior to the incorporation, or under the general Insurance Law under which the association was reincorporated.

Section 209 of the Insurance Law \* provides as follows: "Every such association, corporation or society, other than secret fraternal societies now authorized to do business in this State, must hereafter, before the adoption of any by-law or amendment thereto cause the same to be mailed to the members and directors of such association, society or corporation, together with a notice of the time and place when the same shall be considered, which notice shall be the same as hereinbefore required for stated meetings."

The notice required for such meetings in the same section is as follows: "Not less than five days' notice of each meeting shall be given to each director, and to each member and policyholder who shall have been such for thirty days, in such manner as the by-laws may direct, except that in lieu thereof such notice may be given to the subordinate body of a society having a grand or supreme body, or to a local board subordinate to the association."

It is conceded that the body of policyholders in this association were never given or served with any proposed code of by-laws, or with any notice of any meeting where any by-laws were proposed to be considered.

It goes without argument that the Legislature by the enactment of the provisions of the Insurance Law above quoted intended to vest in the policyholders of the association the power to adopt by-laws for its management, and that that body alone possessed the power of corporate legislation on that subject.

\* See Laws of 1892, chap. 690, § 209, as amd. by Laws of 1894, chap. 271.—[Rmp.]

Any by-laws adopted or attempted to be passed by the executive committee touching the number of directors to manage the affairs of the association, or fixing their term of office must, therefore, be necessarily null and void, unless the old executive committee in management of the affairs of the association had the power to adopt such by-laws by virtue of the provisions of section 29 of the General Corporation Law,\* the latter part of which section reads: "Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation."

The power, however, conferred by this clause is qualified and limited by the latter part of subdivision 5 of section 11 of the General Corporation Law † declaring that: "No by-law adopted by the board of directors regulating the election of directors or officers shall be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election."

We, therefore, cannot escape the legal conclusion that no by-laws binding on any policyholder of the association were ever adopted, and the rights of the parties to this proceeding must be determined as though no by-laws were ever attempted to be adopted; for there was not and could not be sufficient time between the 15th of June and the 19th of June, 1906, to comply with the requirements of the subdivision last quoted. When the annual election was held only about 1,500 votes out of a total membership of about 9,000 were cast. Most of these votes were cast under proxies claimed to have been obtained.

We cannot understand how directors chosen under the circumstances stated can claim to have been legally elected, or entitled to administer the affairs of this company.

The members or certificate holders in this association are entitled to determine in the manner pointed out by the statute by the adoption of an appropriate by-law not only the number of directors who shall administer the affairs of the association, but also the duration of their terms of office; whether all shall be chosen annually, or only a portion of the board shall be elected each year.

They have never had the opportunity to even be heard on those

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\* See Laws of 1892, chap. 687, § 29, as amd. by Laws of 1904, chap. 737.— [REP.]

† Amd. by Laws of 1895, chap. 672.— [REP.]

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questions. In fact no notice of any legal election has ever been given to the policyholders, and we are forced to the irresistible conclusion that the respondents have no legal claim to the office they now fill, and that the election was illegal and void.

The contention of the respondents that section 27 of the General Corporation Law, under which this proceeding is instituted, is not applicable to an insurance company organized upon the co-operative or assessment plan I do not deem sustainable. The argument made is that this is not a stock corporation having capital stock divided into shares with a registered ownership entitling the holder of each share to a vote for directors. The 27th section is a part of the General Corporation Law. It forms one of the sections of a distinct chapter relating to corporations generally. This chapter classifies and relates to all kinds of corporations, and its provisions define how the powers and privileges of corporations may be exercised, whether organized as a stock corporation or a non-stock corporation, whether a moneyed corporation, a business corporation, or a membership corporation. The terms of the 27th section of this chapter are general giving the Supreme Court power to review elections "of any corporation" without any limitation as to its application, and there appears no good reason why the powers of review conferred should not be exercised to correct an election held by an assessment insurance company, as well as that of a stock corporation.

It is also urged that as the 27th section of the General Corporation Law requires notice of the application "to the adverse party or to those to be affected thereby," the provisions of the section are not complied with by notice to the corporation, and to the board claiming to have been elected, but that notice should have been given to the 9,000 policyholders of the company as well. Such a construction would render fruitless the remedies intended to be given by this statute. For in a great majority of corporations the stockholders indirectly interested are so large that it would be impracticable, if not impossible, to give notice to all; and if all are entitled to notice the hearing could not proceed until each had been given the proper notice. We cannot believe that the Legislature intended the impracticable; and we are of the opinion that notice to the corporation itself and to the members of the board of directors, the legality of whose election is challenged, meets all the require-

ments of the section. This construction is upheld in *Schoharie Valley Railroad Case* (12 Abb. Pr. [N. S.] 394).

Again it is urged that the petitioners are not persons legally aggrieved within the meaning of the 27th section, and that the proper remedy is to apply to the Attorney-General to proceed under section 1948 of the Code. Whatever relief is possible under section 1948, the court also has power to annul an election under section 27 of the General Corporation Law, and it is not necessary that the Attorney-General should proceed under section 1948. (*Matter of Northern Dispensary*, 26 Misc. Rep. 147.)

The respondents further contend that the petitioners' position is materially defective in that they do not show that a new election would result differently from the one complained of. It is true that where an election is held at a regular time, and under proper authority, and the only question under dispute is as to whether a given director or set of directors have received the necessary votes required to legally elect to office, that in such cases a person attacking an election must show that he has been injured by the declared result, and that but for the illegal exclusion of votes offered, or the reception of votes not entitled to be received, the result of the election would have been different. (*Ex parte Murphy*, 7 Cow. 153; *People ex rel. Bush v. Thornton*, 25 Hun, 456; *Matter of Long Island R. R. Co.*, 19 Wend. 37; *Matter of Argus Co.*, 138 N. Y. 557; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 168.)

But the case now under consideration is a very different case from any of those above cited. In this case the right to elect any directors at all is challenged until a proper constitution and by-laws have been adopted fixing the number of directors who shall manage the affairs of the association, determining the date of the election and providing for other details of management. It is not a question here of who received a majority of the legal votes cast, but a question as to the legal right to hold any election at all. When the question presented is as to the legality of any election at all, then certainly any member of the corporation must of necessity have a standing in court to test the right to hold an election, and to set aside an election if one is illegally held, no matter what result may have been shown by the ballot. As a matter of fact it appears

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that out of a total membership of about 9,000, but about 1,500 votes in all were cast, and most of them by proxy. In any event it is quite clear to the mind of the court that the petitioners are not required to show in the event of a legal election other directors than those assuming to hold office would be chosen. The petitioners have the right to insist upon a legal and duly authorized election.

Neither do we agree with counsel for the respondents that the petitioners are estopped from questioning the election because three notices of the annual meeting of policyholders to be held June 19, 1906, were printed in the official organ of the association, known as the *Empire State Degree of Honor Journal*. The argument of counsel is that their failure to appear at the meeting at the time named and raise objections to proceeding with the election is tantamount to acquiescence, and that the petitioners are, therefore, estopped from now maintaining this proceeding to set the election aside.

These articles appearing in the *Journal* are, properly speaking, no notices at all of any election of directors. No notice is given in them that any directors would be then chosen, or any election had. The most that can be said for these articles is that they referred to the annual meeting, and one was a notice of the annual meeting without any intimation that nine directors, or any other number, to manage the affairs of the association, were to be elected.

These articles do not rise to the dignity of official notice of an election. But even assuming that they did, I cannot see that the petitioners, or any one else, were required to respect such a notice, or attend any meeting so called for an election. If a legal election of directors could not be held until their office had been properly provided for by the proper adoption of a proper constitution or code of by-laws for the organization and government of the corporation, then no policyholder was bound to respect a call for such an election prematurely made, and cannot be estopped from questioning such an election by failing to attend and protest. He had the clear right to remain away and stand on his legal rights.

We must now consider briefly the practical effect of the illegal election of June nineteenth as bearing on the question of the proper management of the affairs of the association until a legal election can be held.

The reincorporation of the association under the Insurance Law

of the State did not operate to create a new corporation. Its only effect was to subject the corporate entity to the control and provisions of the Insurance Law, and to confer upon the association the powers and privileges given by that law. The membership of the association remained unchanged. Its assets became the assets of the new association. The contracts of the old association became the contracts of the new, and the liabilities of the old became the obligations of the new. There was no change in name of the association. The statute under which the reincorporation took place provides for no immediate change in the officers or managing agents. It was the manifest intent of the statute that there should be no change in the corporate entity, but that existing co-operative or assessment societies by filing the required declaration might bring themselves under the provisions of the Insurance Law, and enjoy the benefits and privileges of that act. Under such circumstances the decisions are uniform that the reincorporation does not operate to create a new and distinct corporation, but is simply the continuation of the old under a new law. (*City National Bank of Poughkeepsie v. Phelps*, 97 N. Y. 44; *Matter of Kansas City Smelting Co.*, 13 App. Div. 50; *Metropolitan Bank v. Claggett*, 141 U. S. 521; *Atlantic National Bank v. Harris*, 118 Mass. 147; *Michigan Insurance Bank v. Eldred*, 143 U. S. 293.)

If this be true then the old officers of the association notwithstanding the reincorporation remained the managing officials of the company, and had the right to direct its affairs until their successors were legally chosen. The by-laws of the association in force prior to the reorganization, in so far as they did not conflict with the provisions of the act under which the association was reincorporated, were of force and effect. In the event of a failure to hold any election of directors the so-called executive board of this association was legally authorized to continue to manage the affairs of the association, for section 23 of the General Corporation Law provides: "If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected." The by-laws in force prior to the reincorporation also provided for the election of the officers who should compose the executive com-



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mittee, "who shall each hold office for one year and until a successor shall be elected or appointed."

If, on the other hand, there was held an illegal election, such as conferred no legal claim to the office of director upon any one, then the old members of the executive committee should have continued to act as the managing board, and the pretended election of their successors could not have changed their legal status as the *de jure* officials of the association. The court is asked to continue in office the nine directors chosen at the illegal election of June nineteenth (even though it concludes to set aside such election) until proper by-laws and directors are legally chosen.

In this suggestion the court cannot concur. It would be committing the management of the affairs of the association to parties not legally entitled to the same. The statutes have designated the legal managers until a proper election can be held. Such managers are the former executive committee of the association.

The election of the respondents on the 19th of June, 1906, must be declared illegal and the said nine directors ousted from control. The future management of the affairs of the association should be returned to the former executive committee until a regular election can be held.

The executive committee should proceed forthwith to submit to the members of the association proposed by-laws and call a meeting for their consideration and adoption, as required by statute in such case made and provided, and immediately thereafter call a special meeting of the members of the association for the election of directors, in accordance with the provisions of such by-laws when so duly adopted.

Let such an order be drawn and settled upon five days' notice to the attorneys of the respondents.

In the Matter of the Judicial Settlement of the Accounts of  
JULIUS ABLOWICH, as Administrator, etc., of HARRIS ABLOWICH,  
Deceased, Respondent.

EMANUEL BLUMENSTIEL, as Administrator de Bonis Non of HARRIS  
ABLOWICH, Deceased, Appellant.

First Department, April 5, 1907.

**Executors and administrators — liability of administrator for obligations of his firm to the estate — effect of revocation of letters.**

When a member of a firm is appointed administrator of an estate to which his firm is indebted he is chargeable with the indebtedness, and notes and checks which represent the debt will be treated as so much money in his hands for the usual purpose of administration.

Nor does he cease to be chargeable with the indebtedness of his firm because his letters are revoked before the estate is administered and the firm obligations are turned over to and accepted by his successor.

INGRAHAM and McLAUGHLIN, JJ., dissented in part, with opinion.

APPEAL by Emanuel Blumenstiel, as administrator *de bonis non* of Harris Ablowich, deceased, from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 4th day of October, 1905, confirming the report of a referee and settling the accounts of Julius Ablowich, as administrator, etc.

*S. Livingston Samuels*, for the appellant.

*Arthur Furber*, for the respondent.

PATTERSON, P. J.:

I concur in the view expressed by Mr. Justice INGRAHAM, "that when this accounting administrator accepted the letters of administration issued to him, he was chargeable with the amount of this indebtedness represented by the notes and checks of the firm of which he was a member as so much money in his hands for the usual purposes of administration." I do not, however, concur in the view that when the letters of Julius Ablowich were revoked before the estate was administered and he turned the notes and obligations of his firm over to his successor, as adminis-

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trator, and those evidences of debt were accepted by such successor, that thereby Julius Ablowich ceased to be chargeable with the amount of the indebtedness of his firm to the estate. If by reason of his appointment as administrator he became chargeable with the amount of the various obligations of his firm, that was a situation in which he was placed by the law. He could not discharge himself from it by turning over the evidences of his own indebtedness to his successor, nor could his successor discharge him by the acceptance of such evidence of indebtedness. If by his becoming administrator, the debt of Julius Ablowich to the estate is to be regarded as assets in his hands, he must be charged with such assets in his account and can only be discharged in the manner provided by law. It seems to me that this is not a case in which the doctrine of the election of inconsistent remedies by the present administrator applies.

I think the decree of the surrogate confirming the report of the referee overruling the objections to the account of Julius Ablowich should be reversed, with costs, and the proceeding remitted for further action.

HOUGHTON and SCOTT, JJ., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented in part.

INGRAHAM, J. (dissenting):

It appeared that one Harris Ablowich died in the city of New York intestate, and on July 5, 1895, the respondent Julius Ablowich was appointed administrator of his estate. Subsequently and in September, 1895, the letters issued to Julius Ablowich were revoked and the Farmers' Loan and Trust Company was appointed temporary administrator, to whom Julius Ablowich turned over all the assets of the estate which had come into his hands. Subsequently the appellant Blumenstiel and another were appointed administrators, and they received the assets of the estate from the Farmers' Loan and Trust Company. Julius Ablowich accounted, pursuant to a decree of the surrogate, on June 5, 1901. Objections to these accounts were filed by certain of the next of kin and by the substituted administrator, and the accounts and objections were sent to a referee. Subsequently the referee reported, overruling the objections both of the next of kin and of the administrator,

which report was confirmed by the surrogate, and from the final decree settling the account of the original administrator, Emanuel Blumenstiel, as administrator, appeals.

The original administrator, Julius Ablowich, was a member of a firm which consisted of himself and two sons. Among the assets of the estate of Harris Ablowich which came into the hands of the administrator were found various promissory notes and checks of this firm, amounting to a large sum, but which were disputed by the firm, it being claimed that these notes were accommodation paper. After the letters of administration were revoked, Julius Ablowich turned over these notes and checks, with the other assets of the estate, to his successor, the temporary administrator, and subsequently upon the appointment of a substituted administrator he commenced an action against the members of the firm on these notes and recovered judgment against them for the amount due. The firm of Julius Ablowich & Co. subsequently became insolvent and were adjudicated bankrupts. This copartnership was insolvent at the time of the death of the intestate, and although they continued in business for some months thereafter they never had assets sufficient to pay the indebtedness of the firm.

In the account filed the administrator charges himself with \$7,057.03, being cash received and notes and other obligations collected, which it is conceded were turned over to the temporary administrator. There was also annexed to the account a schedule "B," which contained a statement of the property other than money received by the accounting administrator which had been turned over by him to the Farmers' Loan and Trust Company, the temporary administrator. Included in this were the notes and checks of the firm of which the accounting administrator was a member, aggregating more than \$40,000. By the objections the substituted administrator sought to charge the accounting administrator with the amount of these various checks and notes of the firm as money in his hands for which he was bound to account. The referee found that the accounting administrator was not chargeable with the amount of these notes as money in his hands, and he was discharged from liability on the accounting, having turned over all the notes and other obligations to the temporary administrator.

The only question presented on this appeal is, whether the surro-

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gate should have charged the accounting administrator with the amount of these notes and checks as money in his hands. The intestate died on June 14, 1895, and the firm of which the accounting administrator was a member continued in business up to October, 1895, when it failed. The order revoking the letters of administration was made on the 26th day of September, 1895, before the failure of the firm. The question must, I think, depend upon the rule of the common law, and not upon the provisions of section 2714 of the Code of Civil Procedure. That provision relates solely to executors and was designed to change the rule of the common law that the appointment of a debtor by a creditor as his executor extinguished the debt except as to creditors, so that the executor was not bound to account for the same as assets, and to introduce a new system in reference to such an indebtedness. It was the obvious purpose of the statute not only to save the executor's debt from extinguishment, but in order to obviate all difficulty, doubt and embarrassment, to cause it to be regarded as money in his hands. (*Baucus v. Stover*, 89 N. Y. 1.) The question was not before the court in *Keegan v. Smith* (60 App. Div. 168), as in that case the surrogate had charged the administrator on his accounting with an indebtedness that he owed to the intestate, and the action was based upon the decree of the surrogate against the administrator's surety. The propriety of a charge in the decree was not before the court, and although there was some expression in the opinion which would seem to indicate that this provision of the Code applies to administrators, as well as to executors, what was said was merely to indicate that since this provision of the Code the rule in regard to executors had been assimilated to that of administrators. But there was nothing in this provision of the Revised Statutes, which was subsequently inserted in section 2714 of the Code of Civil Procedure,\* that changed the rule in relation to the obligation of an administrator to account for money that he owed to the intestate at the time of the intestate's death. At common law it was the rule (as stated in 11 Am. & Eng. Ency. of Law [2d ed.], 787), "if a debtor of the testator was appointed executor the debt was extinguished, but a grant of administration to the debtor of the

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\* Sec 2 R. S. 84, § 13; Laws of 1893, chap. 686.—[Rep.]

decedent merely suspended the remedy of the estate for a time against the debtor and did not extinguish the debt. But the rule in equity is that a debt due from an executor or administrator is considered as having been paid to himself, and, therefore, he is accountable for the amount of his debt as assets in his hands." And in the same volume (p. 834): "In the United States the equitable rule has been generally adopted by the courts or expressly enacted by statute, and a debt due from an executor or administrator becomes, immediately on his appointment, assets in his hands. But the rule first stated is merely one of convenience and will not be allowed to work prejudice to those beneficially interested, nor does it apply where the executor or administrator treats the debt as a subsisting obligation." And in the same volume, at page 1203, it is said: "The modern doctrine as to the effect of appointing a debtor of the decedent executor of his will or administrator of his estate is that payment of the debt is presumed to have been made, and the executor or administrator is chargeable in his account with the amount of the debt as cash in hand. This seems to be the invariable rule if he was solvent at any time during his term of office, and in some jurisdictions it is the rule without regard to any question of his solvency or insolvency." In *Marvin v. Stone* (2 Cow. 781) the question as to the effect of the appointment by a creditor of his debtor as an executor was discussed, and the rule stated that the appointment operated as a release or extinguishment of the debt, or the action for it, upon the ground that such must have been the intention of the testator, because, by making the debtor an executor, he voluntarily destroys the only remedy or means by which the debt can be collected. The rule is universal that when the remedy is suspended by the act of the party entitled to it, it is destroyed forever. Attention was then called to the qualification, as universal as the rule itself, that it did not apply where the testator does not leave funds sufficient for the payment of his debts; that in such case the debt due from the executor should be considered assets in his hands for the payment of the debts of the testator, and by considering it assets the difficulty is avoided as to the means of enforcing payment.

The reasons for the rule given in this case, while applicable to executors, do not apply to administrators, as the appointment was

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one by the law and not by the intestate. As to administrators the rule is that where a debtor of an intestate takes upon himself the administration of the estate he will be at once charged with the amount of his indebtedness to the estate and bound to account for such indebtedness, both as to creditors and the next of kin. But the mere fact of appointment as administrator does not of itself destroy the obligation, and the rule of law charging the executor or administrator with the amount of debts as assets in his hands is merely adopted as a method of collecting the indebtedness, as, if the rule were not adopted, it being impossible for the administrator to sue himself, there would be no method of collecting the debt. It has also been held that under the provisions of the Revised Statutes (2 R. S. 84, § 13), which have been re-enacted as a part of section 2714 of the Code of Civil Procedure,\* where the member of the firm who was appointed executor owed a debt to the testator, as the executor could not sue the firm of which he was a member, the debt should be treated as so much money in his hands for administration, and there is no reason why this rule should not apply to an administrator.

It would seem to follow, therefore, that when this accounting administrator accepted the letters of administration issued to him, he was chargeable with the amount of this indebtedness represented by the notes and checks of the firm of which he was a member as so much money in his hands for the usual purposes of administration. The debt not being extinguished, the remedy being suspended, when his letters were revoked before the estate was administered, and he was required to turn over to the temporary administrator the assets of the estate in his hands, the question was presented as to whether the estate would reserve the claim upon the notes, receiving them as a part of the estate, or insist upon a claim against the accounting administrator as so much money in his hands for which he was accountable. It might well be that the firm obligations would be much more valuable to the estate than a claim against the administrator as a debtor of the estate. The fact that the administrator or executor could be charged with the amount of his indebtedness to the estate does not of itself discharge the obligation of the debtor

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\* See Laws of 1893, chap. 696. — [REPR.]

to the estate or affect any lien that the intestate or testator held to enforce the obligation. That was expressly held in *Soverhill v. Suydam* (59 N. Y. 140). The indebtedness not being discharged until actual distribution, where the letters of an administrator were revoked, the question whether he should be chargeable with the amount of this indebtedness of the firm of which he was a member, and the estate should look to him on an accounting, or whether the obligation should be transmitted by him to his successor as a part of the estate and accepted by the succeeding administrator as such, was a question which had to be determined by the substituted administrator. The accounting administrator, acting under the decree of the surrogate, actually delivered to the temporary administrator these notes and checks as property of the estate, and they were accepted as a compliance with the decree of the surrogate revoking the letters. When letters of administration were issued these checks and notes were turned over to the administrator. He accepted them from the temporary administrator and commenced an action against the copartnership, including the accounting administrator, and recovered a judgment upon the notes and checks. This was an election to treat the accounting administrator as a debtor of the estate upon the notes themselves, the estate retaining this claim against the other members of the firm, which was entirely inconsistent with a right of the estate to treat the notes as paid and the amount represented by them as money in his hands belonging to the estate. Where a party has inconsistent remedies, an election of one, especially where it is prosecuted to judgment, is a bar to the other. (*Fowler v. Bowery Savings Bank*, 113 N. Y. 450; *Terry v. Munger*, 121 id. 161; *Droege v. Ahrens & Ott Mfg. Co.* 163 id. 466.) There is a distinction between a case where an executor or administrator administers the estate and distributes it among the creditors or next of kin or legatees, and a case where letters of administration have been issued but are revoked before the estate is distributed. When the letters are revoked, the estate is protected by retaining the liability of the administrator in favor of his successor. The duty had not devolved and never did devolve upon him to administer the estate and distribute its assets among the creditors and next of kin. He accounted to his successor, the temporary administrator, by delivering all of the assets of the estate which had come



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into his hands, including the obligations of the firm of which he was a member, and such assets were accepted from the accounting administrator as a part of the estate. The estate could not then enforce these obligations both against the administrator and the other members of the firm as debtors of the estate, and at the same time insist that the obligations had been paid and that the amount was in the hands of the accounting administrator for distribution; and an election to proceed against the firm upon the notes on behalf of the estate was, I think, an election of remedies within the authorities above cited.

For this reason, I think the learned surrogate correctly held that the administrator had accounted for all the property that he had received as administrator and passed his accounts, and the decree must, therefore, be affirmed, with costs.

McLAUGHLIN, J., concurred.

Decree reversed, with costs, and proceedings remitted.

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TRACY W. PRATT, Appellant, v. WILLIAM IRVING CLARK and CAROLINE L. ISELIN, as Executors of and Trustees under the Last Will and Testament of CHARLOTTE M. GOODRIDGE, Deceased, and Others, Respondents.

First Department, April 5, 1907.

**Real property — contract by lessee and executors of deceased lessor to assign lease — specific performance refused.**

The owner of a lease containing covenants for renewal entered into a contract to assign the same to the plaintiff upon the condition that the latter obtain from the executors of the deceased lessor an agreement to renew the lease at its expiration. At the time of performance it was contended by the plaintiff that the executors of the deceased lessor were without power to continue the lease or renew it for a period extending beyond the termination of their trust. The executors and those interested in the estate of the lessor affirmed the agreement for the assignment of the lease, but the plaintiff was not willing to accept the proffered assignment on the ground that the executors were without power to perform.

*Held*, that the lessee in his agreement to assign made no covenant that the lease and renewals thereof were valid and enforceable, he merely agreeing to transfer the lease as it stood;

That although the agreement was conditioned upon the lessor's executors being willing to make a new lease, as they were willing to make it, the plaintiff by refusing to accept the assignment upon the ground that the executors were without power to execute the new lease was in default and not entitled to a specific performance of the agreement to assign.

APPEAL by the plaintiff, Tracy W. Pratt, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 22d day of March, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

*Samuel Untermeyer*, for the appellant.

*Albert Stickney*, for the respondents, executors and others.

*Albert Stickney, Jr.*, guardian ad litem for infant respondents.

INGRAHAM, J.:

This action was for the specific performance of a contract by which the defendant Todd agreed to assign and convey to the plaintiff certain leasehold property in the city of New York. The agreement was dated July 16, 1904, and was between the defendant Louis L. Todd, party of the first part, and Tracy W. Pratt (plaintiff), party of the second part. This agreement recited that the executors of Charlotte M. Goodridge, and others, by an instrument dated May 1, 1902, had leased to Todd certain lots of land on the northwest corner of Thirty-sixth street and Broadway in the city of New York, the term of which lease extended up to the 1st day of May, 1907, and which lease contained certain covenants as to renewals, the said lease being in effect a modification and extension of certain other leases and agreements, the first of which took effect on or about May 1, 1886, and also two other leases of adjoining property; it being intended that all of the rights, property, powers, privileges, interests and estate of the party of the first part, whether as lessee, assignee or otherwise, under or in any of the aforesaid leases or

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agreements, or other instruments in relation to the whole or any part of said property above referred to, and any rights thereunder or in connection therewith, should be comprehended in and be so far as was necessary or proper included in and passed by said instrument; that the party of the first part had erected or caused to be erected the buildings now on said premises and owned the same, together with the fixtures therein and thereto annexed, and had certain rights, estates and privileges in connection therewith, and owned the personal property, being the furniture and all personal property contained therein or connected therewith, and used in or convenient for use in connection with his business as proprietor of the Marlborough Hotel; and also recites that the party of the first part controls all the rights, property and interest of the said lessee mentioned. The agreement provided that the party of the first part, in consideration of the sum of \$400,000, agreed for himself, his heirs, executors, administrators and assigns, to sell, assign, transfer, convey and deliver, or caused to be sold, assigned, transferred, conveyed and delivered unto the party of the second part, his heirs, executors, administrators and assigns, the said Goodridge, Everhart and Bradley leases, and the property, estate, rights and interests covered thereby or any of them, including any claim in connection with the assessments or taxes of 1899 and 1900, together with the building or buildings erected on the Goodridge property, and all the machinery, fixtures, furniture and personal property of every kind and nature of the Marlborough Hotel; and the party of the second part (plaintiff) agreed, in consideration of the said assignment, transfer, sale, delivery and conveyance, to pay to the party of the first part, his executors, administrators or assigns, the sum of \$400,000 — \$200,000 by assuming, or causing to be assumed, two mortgages upon the Goodridge property, and the further sum of \$200,000 as follows: In bonds of a hotel company by a mortgage, as in said agreement thereafter described, the sum of \$50,000 in said bonds; by the party of the second part paying or assuming to the satisfaction of the holders of the Goodridge, Everhart and Bradley leases any rentals, taxes, assessments, water rates, interest or other sums that might be due under or on such leases; and the balance of the said \$200,000 to be paid to the party of the first part in cash at the time of the execution of the convey-

ance, assignment, transfer and delivery of the property and business above referred to and the passing of the title thereof. It was further understood that the party of the second part proposed to take over, or cause to be taken over, the said hotel, leases, property and business to and into the name of a corporation to be duly formed under the laws of the State of New York which should be satisfactory to the said Clark and Iselin, trustees, and that the said corporation would issue bonds and a mortgage upon the above-mentioned leases and its right and title therein, and upon all the buildings, etc., acquired by it, subject only to the liens and incumbrances as above set forth, the said mortgage and bonds not to exceed in amount the sum of \$200,000. The agreement was then conditioned upon the party of the second part, his executors, administrators or assigns, obtaining from the owners of the Goodridge property such a lease, or agreement for such a lease, to commence May 1, 1907, and to extend for twenty-one years, at the annual rental of \$45,000, payable monthly in advance, with the taxes, assessments, etc.; that the assignment of the said leases and other papers necessary or proper to carry out the agreement were to be executed and delivered on the 8th day of September, 1904; interest, rent and premiums on insurance policies to be adjusted and paid as the interests of the several parties might appear. The time for the completion of this contract was extended by the consent of the parties from time to time to the 3d day of November, 1904. In the meantime a question had arisen as to the power of the trustees of Goodridge to make a lease which would continue for the period that the leases and renewals thereof were to continue. Negotiations were had with the trustees of Goodridge's estate, who were willing to give a new lease, but in consequence of the question as to their power to lease, the plaintiff was not willing to complete the transaction until such a new lease had been authorized, or the old lease which the plaintiff undertook to transfer had been validated by some judicial proceeding, and there was evidence tending to show that the executors of Goodridge had agreed to commence some proceeding which would validate the lease or authorize a new lease for the term that the plaintiff desired.

On the 29th day of September, 1904, an agreement was executed between the Goodridge trustees and the beneficiaries under the will

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of Charlotte M. Goodridge, consenting to the assignment of the lease by Todd, and the trustees agreeing to execute a new lease of the premises, a copy of which lease was annexed to the agreement; and it was further agreed that the assignment by Todd and the execution and delivery of the new lease should be consummated on the 17th day of October, 1904. Finally, on the 26th of October, 1904, a supplemental agreement was made between the trustees and those interested in the estate of Charlotte M. Goodridge and the plaintiff, which reaffirmed the agreement of September 29, 1904, and which also provided that, "subject to the adjustment of such details in a manner to be agreed upon by the respective attorneys named below, the final performance and closing of the contract is hereby adjourned until the first day of November, 1904, or to such other time or times as may be hereafter agreed upon by said attorneys," and the performance of this contract was subsequently adjourned to the 3d of November, 1904.

Thus the final condition of the contract between the plaintiff and the defendant Todd, and between the plaintiff and the trustees and those interested in the estate of Charlotte M. Goodridge, both stood adjourned to the 3d of November, 1904. At that time it is conceded that the plaintiff was not ready to perform either of these contracts. No proceedings had been commenced to validate the lease, nor had the trustees received any express authority to execute a lease of the premises; and the plaintiff claimed, and was sustained by the title company to whom the question as to the validity of the lease had been submitted, that the trustees of the estate of Goodridge had no authority to execute a lease which, including renewals, would extend beyond the termination of the trust. It is evident that the plaintiff refused to complete his contract until he could get a lease that the title company would accept, and that the title company would not accept a lease for the full term, including the renewal which the Goodridge trustees and those interested in the estate could execute. At any rate, the plaintiff never did offer to complete his contract, and never was in a position to complete it. After November 3, 1904, nothing seems to have been done in relation to the carrying out of the contract, and the time within which it was to be performed not having been extended by any agreement, the trustees of Mrs. Goodridge and those interested in her estate

served a notice upon the plaintiff that they had been at all times ready to perform the agreement dated September twenty-ninth, and that they would be ready at all times to perform the agreement before the 22d of November, 1904, upon notice to them or their attorney of a time and place at which the plaintiff would be ready to perform, and that in default of such notice they would attend at the office of their attorney on the 22d day of November, 1904, at one o'clock P. M., prepared and ready to perform said agreement on their part, and that if the plaintiff did not attend at that time and perform said agreement on his part, said agreement would be terminated and at an end, and would be so considered by the undersigned. This was signed by the executors of Mrs. Goodridge and those interested in her estate by their attorney. On November twenty-second the plaintiff did not perform, and on November twenty third he served a notice on the trustees, in which he stated that he would be ready and able to perform said contract on his part, and was willing to do so, provided the other parties to said contract performed it on their part. He asserted that the other parties to the contract were not able at that time to perform the same on their part, and that they had not tendered on their part proper performance of said contract; and the plaintiff then demanded that the trustees and Todd take such action as should be necessary to put themselves in a position to lawfully and fully perform the said contract, and for such purpose the plaintiff offered to adjourn or postpone the closing of said contract for a reasonable time. The plaintiff, therefore, having failed to perform on the day fixed, and having claimed that the other parties to the agreement were unable to perform, the trustees and those interested in the estate of Mrs. Goodridge and Todd made a new contract with the Sweeney-Tierney Company, and the lease and hotel and other property were transferred to it.

The question in dispute necessarily depends upon the question as to whether a transfer by Todd to the plaintiff of the leases as they existed was a compliance with this contract or whether, in order to comply with the contract, Todd had to tender to the plaintiff the transfer of a lease which would be a valid lease for the period of the various renewals provided for therein. In other words, whether there was an implied covenant that the lease and all renewals were valid so that they could be enforced, and the plaintiff's claim on this appeal

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is based entirely upon the assumption that there was such an implied covenant. The contract recites the leases that were held by Todd, and it was those leases that he agreed to transfer. There was no covenant in the contract that these leases would insure to the plaintiff the continuance of the term or that the covenants for renewals in the lease were valid and could be enforced. What Todd agreed to do was to transfer the leases that he had and which were recited in the agreement, and what the plaintiff undertook to purchase was the leases recited in the agreement. The agreement was conditioned upon the Goodridge trustees being willing to make a new lease, but if they were not willing or able to make a new lease the only result would have been that the plaintiff's obligation to carry out the transaction terminated. There was no default on Todd's part in that event. Nor could the plaintiff hold Todd for a breach of the contract if the executors were unable or unwilling to execute the new lease which the plaintiff desired. The trustees and those interested in the estate of Goodridge agreed to execute a new lease and they were willing to execute it as provided for in the agreement between the plaintiff and Todd, but the plaintiff refused to accept such a new lease upon the ground that the trustees could not execute a lease for a period beyond the term of their trust, and thus the question stood, the plaintiff refusing to complete because he could not get the lease that he desired, the trustees and Todd being willing to complete, Todd to give a transfer of the leases and property which were recited in the contract and the trustees to give the lease contemplated in the agreement. Whether or not the lease of the trustees would have been valid for a period beyond the termination of the trust it is not necessary for us to determine. The trustees were given by the Goodridge will power to make leases, and it is not at all clear that a lease given in the exercise of that power would not have been a valid lease for such a term as the trustees saw fit to grant. But whether or not the lease would have been good for the whole period the offer of Todd and the trustees to perform their contract was not at all dependent upon the validity of the lease for the whole term which a renewal would insure to the lessee, and I think that on the seventeenth day of November the parties to these agreements had the right to require the plaintiff either to complete his contract and accept what Todd agreed to give

him as a completion of the contract or that the contract should terminate.

It seems to me that this question is whether or not the plaintiff was, under the contract with Todd and the trustees and those interested in the Goodridge estate, bound to accept from them the transfer which they were able and ready to give, including the new lease; so that on the execution of such transfers and conveyances and the new lease by the trustees and those interested in the Goodridge estate, Todd and the Goodridge estate had complied with their contract. I think such a transfer and new lease were a compliance with the contract, and that the plaintiff was then in default. This being the situation, it was within the right of the trustees and Todd to insist that the plaintiff perform his contract by a day named, giving him a reasonable time to perform, and upon his failure to perform declare the contract at an end. The notice that was given to the plaintiff to perform on or before the twenty-second day of November formally took this position: that the trustees and Todd were ready and willing to perform the contracts, and they required the plaintiff to perform on his part. He made no objection to the fact that the time was not sufficient; he requested no further time, but took his stand upon the position that Todd and the estate of Goodridge were not able to perform, and that he would not accept the transfers and the new lease as a performance of the contract. Under such circumstances it seems to me that there was no ground upon which the plaintiff could maintain an action for specific performance. There never was any question as to Todd's title to the lease, or as to his power to give a good transfer of the interest in the lease that he had; and that was all he undertook to do.

For this reason I think the judgment appealed from should be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed, with costs.



EDWARD MITCHELL, Respondent, v. ELISABETH MILLS REID,  
Appellant.

First Department, April 5, 1907.

**Real property — easements in light and air created by deed — grantees take subject thereto.**

A perpetual easement in light and air when created by deed runs with the land, and the rights and obligations thereof pass to the grantees of the dominant and servient tenements.

The owner of lands sold a portion in the center of a plot, granting easements in light and air over an adjoining portion specified and reserving the same easements for the benefit of the portion not sold. Thereafter the owner conveyed to the defendant a portion of the lands which included the portion servient to the easement, and also conveyed to the plaintiff other portions entitled to the benefits of said easements, both deeds reciting the existing easements.

*Held*, that the plaintiff was entitled to an easement in light and air over the portion servient thereto conveyed to the defendant, and that the defendant could not obstruct the light and air by building upon said portion.

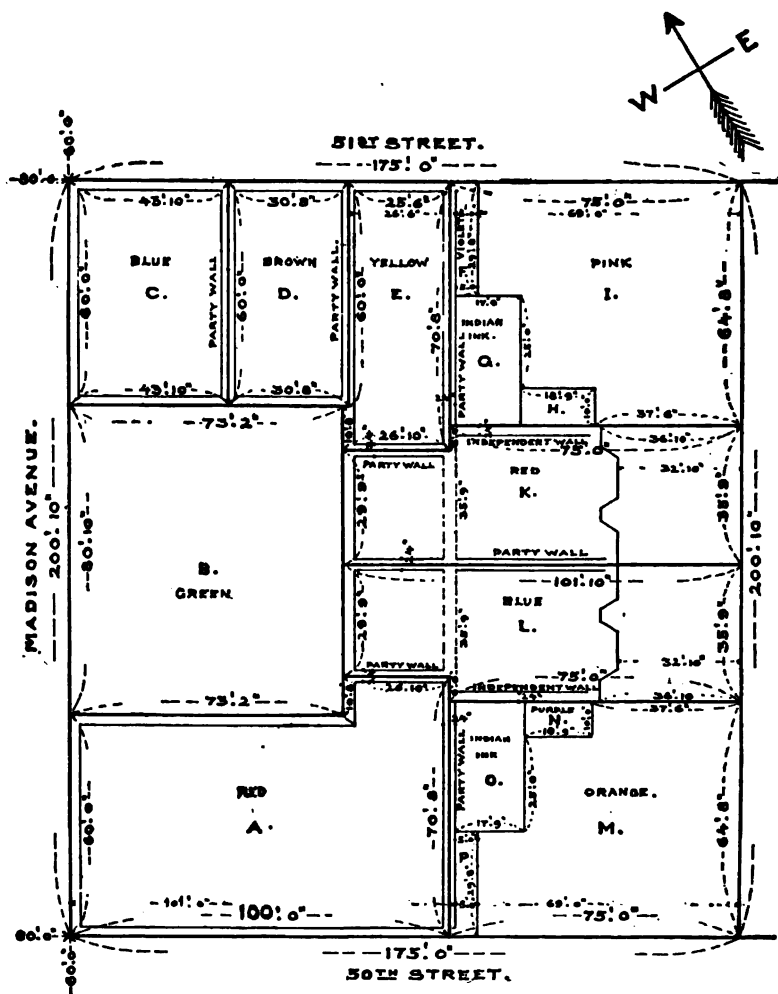
APPEAL by the defendant, Elisabeth Mills Reid, from a portion of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of November, 1905, upon the decision of the court rendered after a trial at the New York Special Term.

*Henry W. Sackett*, for the appellant.

*John M. Bowers*, for the respondent.

INGRAHAM, J.:

Prior to January 15, 1884, Henry Villard was the owner of a piece of land on the east side of Madison avenue, between Fiftieth and Fifty-first streets, in the city of New York, and with a depth of 175 feet easterly from Madison avenue. Contemplating the improvement of this property, he had a map of it made, which was dated May 16, 1883, and was filed in the office of the register of the county of New York on January 15, 1884, and is as follows:



This map shows a plot on the northeast corner of Fiftieth street and Madison avenue of sixty feet on Madison avenue, and one hundred feet on Fiftieth street that was marked A; adjoining that on the east was a small strip of land extending from Fiftieth street about five feet in width and twenty-nine feet eight inches in depth marked P; in the rear of this strip of land there was laid out a plot of seventeen feet nine inches in width and thirty-five feet in depth adjoining plot A, the corner plot on the east marked O; to the north of plot O there was a plot of ground thirty-five feet nine inches in width, one hundred and one foot ten inches in depth

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marked L on the map. There was also laid out a small piece of land at the intersection of the easterly line of O and southerly line of L eighteen feet nine inches by ten feet marked N upon the map, and a plot of land fronting on Fiftieth street, seventy-five feet by sixty-four feet eight inches, which was bounded on the west by plots P, O and N, marked M.

There was also laid out upon the plan a plot of land fronting on Madison avenue commencing sixty feet north of Fiftieth street, eighty feet ten inches in width by seventy-three feet two inches in depth which was to be an open court, furnishing an entrance to the houses on the corner of Fiftieth street and Fifty-first street and Madison avenue and also an entrance to plots L and K on the map, the plans thus indicating certain portions of the property to be covered with buildings and certain other portions to be free of buildings for the benefit of the property adjoining.

Some time in 1883 Villard commenced building a house on the corner of Fiftieth street and Madison avenue now owned by the defendant, and it was nearly completed when A. H. Holmes purchased plot L upon which Holmes proceeded to build a house which was completed in May, 1884. The conveyance to Holmes was dated the 27th of December, 1883. This conveyance was made before the filing of the map in question, which was not referred to in the description of the property. The premises were described by metes and bounds and an analysis of this deed is essential to the determination of the question here presented.

The property conveyed is described as a certain lot, piece or parcel of land being "in that certain block of land bounded northerly by Fifty-first street; easterly by Fourth avenue; southerly by Fiftieth street; and westerly by Madison avenue." The premises conveyed being bounded and described as follows: Beginning at a point on the center line of said block distant seventy-three feet two inches eastwardly from the easterly line of Madison avenue, running thence eastwardly along the center line of the said block one hundred and one feet and ten inches; thence southwardly and parallel with Madison avenue thirty-five feet nine inches; thence westwardly and parallel with the said center line of said block seventy-five feet; thence northwardly parallel with Madison avenue six feet; thence westwardly parallel with the center line of the block twenty-six feet ten inches;

and thence northwardly and parallel with Madison avenue twenty-nine feet nine inches to the point or place of beginning. There was thus conveyed a plot of ground in the middle of the block and with it there was also conveyed "a perpetual right and easement of light, air, prospect, ingress, and egress upon, over and across all that certain parcel of land adjoining and west of the said premises" particularly described by metes and bounds, being the open courtyard marked B upon the map; "which said parcel of land last described is to be used in common by the parties hereto and their heirs and assigns and other owners of land adjoining the same, on the northerly, easterly and southerly sides thereof, as an ornamental court yard and for no other purpose." There was also granted "a perpetual right and easement of light, air, prospect, ingress and egress upon, over and across a certain parcel of land and courtyard adjoining and south of the premises hereby conveyed," which was also described by metes and bounds, which was plot O upon the map; and also a right of way and passage five feet in width and seven feet in height above the level of the sidewalk in Fiftieth street, from the courtyard last above described, namely, plot O on the map, to the northerly side of Fiftieth street, the westerly line of said right of way being distant one hundred and one foot easterly from and parallel with the easterly line of Madison avenue, together with the right to have and maintain a vault, coal chute and sewer pipes beneath the surface of said last-mentioned courtyard and right of way as the same now are in connection with the dwelling house erected upon the premises thereby conveyed. There was also granted "a perpetual easement of light and air over and across that certain parcel of land adjoining the court yard last above described on the easterly side thereof and adjoining the premises hereby conveyed" and described by metes and bounds, which was plot N upon the map.

Under this grant Holmes entered into possession of the premises conveyed to him, with the various easements over the adjoining plots of land secured to him by this conveyance, and which he still continues to hold, occupy and enjoy.

Villard remained the owner of plots A and M, A being the property upon which he erected his dwelling house and M being the plot of ground to the east seventy-five feet on Fiftieth street by

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sixty-four feet eight inches in depth. Subsequent to the conveyance to Holmes, Villard and wife conveyed to William Endicott, Jr., and Horace White, all this block of land, excepting and reserving therefrom the property conveyed to Holmes, and also the property adjoining Holmes on the north, which had been conveyed to Adams, and the easements appurtenant thereto in trust to pay the interest upon mortgages and the taxes and assessments of the property; to carry out and fulfill the existing contracts for the improvement of all the said premises and for the completion of the buildings now in process of construction and completion, so that all of said premises should be free and clear of all liens or claims of mechanics or materialmen or otherwise; to satisfy any indebtedness owing by Villard to a railroad company named, and to pay over the rest, residue and remainder of the said premises to Mrs. Villard, with power to mortgage, lease or otherwise dispose of or sell at private or public sale for cash or otherwise any part of the said premises.

On the 28th of January, 1884, by an instrument in which Villard and wife were parties of the first part, Endicott and White as trustees parties of the second part, and Holmes party of the third part, which recited the purchase of this tract of land by Villard with a view to the building upon and division of the same in the manner shown upon a map or survey of the same which had been filed in the office of the register of the city and county of New York on the 15th day of January, 1884; that while so seized of the said premises he sold to Holmes in fee simple that portion of the said lands and premises designated in the said map or survey by the letter L, "together with certain easements of light, air, prospect, view, passage, way, ingress and egress over portions of the premises laid down in said map or survey and thereon designated as parcels B, N, O, P, as appurtenant to said parcel L;" that the "said deed to the party of the third part fails to grant and convey an undivided share or interest in the parcel of land or court yard designated on said map or survey by the letter B and the color Green and also fails to grant and convey the easements of way, passage, ingress and egress over and upon said parcels O and P as sole and exclusive easements as it was the intent of said parties to said deed should be done. Now, therefore, this Indenture witnesseth: That the said parties of the first and

second parts for the better fulfilment of the understanding and agreement aforesaid and to correct the errors or omissions aforesaid in said last mentioned deed of conveyance \* \* \* have confirmed and hereby do confirm unto the said party of the third part and to his heirs and assigns forever all and singular the property, premises, rights and easements granted in and by the aforesaid deed of conveyance to said party of the third part and in addition thereto have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the third part to his heirs and assigns forever" the courtyard shown upon the said map by the letter B; and also a "perpetual, full, unrestricted, sole and exclusive easement and right of way, passage, ingress and egress over and upon said parcel of land designated on said map or survey by the letter O and the color Indian Ink and every part and parcel thereof, free from the use, control and interference of any person or persons whomsoever but reserving to the owners of parcels *A and M* on said map or survey adjoining said parcel O on the easterly and westerly sides thereof easements of light, air and prospect, from and over the same, as in said deed of conveyance to the party of the third part the same are mentioned or reserved." The party of the third part, Holmes, then covenanted to keep and maintain the inner courtyard at or near the average level of the sidewalk in Fiftieth street opposite the entrance to the passage or way designated on said map or survey by the letter P; and also a "perpetual, full, sole and conclusive easement and right of way, passage, ingress and egress at the grade of the sidewalk in front thereof five feet in width and seven feet in height above said grade over, upon and across said parcel or strip of land designated on said map or survey by the letter P to and from Fiftieth street, free from the use, control or interference of any person or persons whomsoever."

It is important to consider the easements or rights to which these three parcels, N, O and P, had been subjected by these conveyances. The title still remained in Villard, or Endicott and White, as trustees for Villard; but Holmes had acquired easements appurtenant to the premises acquired by him to which these three parcels of land were subject. It is quite apparent, both from the plan or survey and from the nature of the buildings that had been erected upon these premises and the covenants in these deeds, that it was the

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intention that neither parcels N nor O should be built upon, with the exception of a building upon N which was not to exceed the first story above the parlor floor of the building erected upon the property acquired by Holmes, and that these two pieces of property should be used as open courtyards for the benefit of Holmes' property and for the two pieces of property retained by the grantors, being plots A and M on the map. Under this second Holmes deed the grantors expressly reserved to the owners of parcels A and M on the map or survey adjoining parcel O on the easterly and westerly sides, easements of light, air and prospect from and over the same, and Holmes covenanted to keep and maintain said inner court O at or near the average level of Fiftieth street. There was thus granted to Holmes easements over plot O and N and at the same time there was reserved as appurtenant to plots A and M the same easements over plot O. These easements thereby became appurtenant to the three pieces of property, A, L and M. The legal title still remained in the grantors, then vested in Endicott and White as trustees, but that legal title was subject to these easements, one in favor of plot L, one in favor of plot A, and one in favor of plot M. It is quite evident that these were intended to run with the land as appurtenant to these several plots of land, each of which abutted on plots O and P. So long as plots A and M and the fee of plots N, P and O remained in the same persons they could do as they liked with these plots, subject, of course, to the easements conveyed to Holmes as appurtenant to his property.

A dwelling house had been erected on plot A to which there had been reserved easements over plot O, but no building had been erected on plot M. By a conveyance made on the 9th day of January, 1886, Endicott and White as trustees under the deed of Villard as parties of the first part; The Oregon Railway and Navigation Company, the corporation in whose favor the trust existed under such deed, of the second part, and Henry Villard, of the third part, conveyed to Fanny Garrison Villard, wife of the said Henry Villard, the property conveyed to the trustees by the deed of 1883, describing these various parcels of land by metes and bounds according to this map or survey and which included parcels A, M, N, O and P subject to the covenants as to nuisances and buildings contained in two certain conveyances specified with the benefits of

and "subject to the conditions of a certain deed dated the twenty-seventh day of December, 1883, executed by Henry Villard and Fanny Garrison Villard, his wife, to Artemas H. Holmes and recorded \* \* \*; and also with the benefits of and subject to the conditions of a certain other deed bearing date the twenty-eighth day of January, 1884, executed by said Henry Villard and others to Artemas H. Holmes and recorded," etc. Fanny Garrison Villard thus having become the owner of plots A, M, N, O and P, subject to the easements appurtenant to plot L owned by Holmes, on the 8th day of November, 1886, conveyed to the defendant a plot of land on the northerly side of Fiftieth street beginning at the corner formed by Fiftieth street and Madison avenue and extending eastwardly on Fiftieth street one hundred and twenty-five feet. This included plot A and part of plot M, one-half of plot N and the whole of plots O and P, with the following reservation: "Reserving herefrom to the owners of the remaining portions of the parcel of land designated by the letter 'M' on the certain map of the property of Henry Villard filed in the office of the register of the county of New York, January 15th, 1884, \* \* \* the reservations contained and mentioned in the deed of said Henry Villard and others to Artemas H. Holmes and recorded in Liber 1770 of Conveyances, page 377, in the office of the register aforesaid in relation to the parcel of land designated by the letter O on said map."

This conveyance was subject to the several conditions, covenants, easements, restrictions and obligations contained in the deeds from Villard and wife to Holmes dated the 27th of December, 1883, so far as the same related to the courtyard fronting on Madison avenue, and "to the easements, covenants and privileges therein contained as to the smaller court yards N and O and the passage way P as shown on said map;" and also to deed made by Villard and wife and others to Artemas H. Holmes dated January 28, 1884, "so far only as the same relates to the said court yard fronting on Madison avenue therein \* \* \* and to the easements, covenants and privileges therein contained as to the smaller court yards N and O, and the passage way P, as shown on said map." By this conveyance the title to lots A and M were severed. Defendant became the owner of lot A and the westerly twenty-five feet of lot M, the



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grantors still retaining the fee of the remaining portion of lot M. There was reserved, however, to the grantor as the owner of the remaining portion of lot M as appurtenant to the portion of lot M retained, the reservation contained and mentioned in the deed from Endicott and White, as trustees of Villard, to Holmes dated the 9th day of January, 1886. As we have seen, what was there reserved to the owners of parcel M was an easement of light, air and prospect from and over parcel O, as in the first deed to Holmes the same was mentioned or reserved. Now, in the first deed to Holmes there was given a perpetual right and easement of light, air, prospect, ingress and egress upon, over and across parcel O. The portion of parcel M conveyed to the defendant was, therefore, subject to the easement reserved to the remaining portion of parcel M, that of light, air and prospect over parcel O, and that necessarily subjected the portion of parcel M conveyed to the same covenants or easements. What the owner of parcel M reserved was an easement of light, air and prospect over an interior courtyard laid out in the middle of this block upon which Holmes had an easement of light, air, prospect, ingress and egress, but upon which there had been reserved to parcel M an easement of light, air and prospect. That easement being appurtenant to the whole of lot M, the owner of lot M conveyed a portion of it, reserving to the remainder the easement that was appurtenant to the whole of lot M so that it became appurtenant to the balance not conveyed.

It seems to me that this reserved an easement over the portion of lot M conveyed of light, air and prospect, so that the portion of lot M conveyed could not be used so as to obstruct or interfere in any way with the easement which had become appurtenant to the remainder of lot M of a use of plot O for this purpose. Any other construction of this covenant or reservation would necessarily destroy the effect of the reservation. The owner of lot M had the right to so use the lot as to maintain an open, unobstructed space between lot O and any part of lot M, and when she conveyed a part of lot M with a covenant that the remainder of the lot should have an easement of light, air and prospect over lot O, she reserved to herself a right to use the part of lot M conveyed, which became appurtenant to the remainder of lot M, and to which the portion of lot M conveyed became subject. She, therefore, has

never conveyed the right to obstruct the portion of lot M that she conveyed in such a way as to prevent the full and free use of the easement that was appurtenant to lot M over lot O.

The extent of the reservation or easement over this portion of lot M which was conveyed, arises from the deed to the defendant which reserved to the grantor in that deed the right to subject lot O to the easement that was reserved to lot M in the deed to Holmes, so that the same should become appurtenant to the remainder of lot M that was not conveyed, and thus the portion of lot M that was conveyed became subject to the right to have the portion of lot M conveyed maintained in such a condition and so unobstructed that the portion of lot M reserved could enjoy the benefits of light, air and prospect over lot O, and this right thus reserved was appurtenant to all of lot M that was reserved, so that all of lot M reserved could enjoy the easement over lot O.

The hardship insisted upon by the learned counsel for the defendant, that the defendant should be the owner of a lot upon which she is required to pay taxes and yet have no use of the lot, is the result of her accepting a conveyance of the property which reserved these easements as appurtenant to the portion of the property not conveyed. Defendant owns the fee of the lot, but she does not own and never has owned the right to obstruct or use this land in such a way as to interfere with the easements reserved by the owner of the remainder of lot M when the conveyance was made. The defendant as well as the plaintiff has the benefit of the maintenance of this plot of ground as an open space for the benefit of her property. She also has the right to use it in any way that is not inconsistent with the right that the owners of lot L and the remainder of lot M reserved; but her title to the lot is subject to the right in the land reserved by its former owner, and which has never been conveyed to her and which she never has owned, namely, the right to obstruct the land so as to interfere with the easement to which it is subject, which was reserved by its former owner. By the second deed to Holmes there was reserved to the grantor, as the owner of plots A and M, this easement of light, air and prospect to which plot O is subject. By the deed to the defendant the owner of the portion of plot M conveyed, reserved to herself, as the owner of the remaining portion of plot M, a right to this easement over plot O

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as appurtenant to the remainder of plot M, and thus what was conveyed of plot M was subject to the use by the remainder of plot M of that easement. Thus the title to defendant is subject to this easement, and when Mrs. Villard, who had reserved to herself the right to use this portion of plot M which she had conveyed to the defendant, conveyed to the plaintiff the portion of plot M adjoining the property conveyed to the defendant, she conveyed the property "together with all the privileges, rights and easements of light, air and prospect over the parcel of land to the west of that above described, namely, a parcel twenty-five (25) feet in width on Fiftieth street and in the rear sixty-four (64) feet and eight (8) inches in depth on each side which the parties of the first part, or either of them have as owners of that certain lot, piece or parcel of land hereinbefore firstly described and conveyed, and as owners of all the remaining portion of the parcel designated by the letter 'M' on a map of the property of Henry Villard." The proposed building by the defendant would entirely cut off all possibility of using any easement over lot O which was appurtenant to the plaintiff's premises, and was, I think, a clear violation of this covenant.

The recitals in these various deeds clearly indicate that plots O and N were to be maintained as open courtyards, and the practical construction of the covenants given by all of the parties who have built houses abutting on these parcels clearly show, I think, that it was the intention to constitute plots O and N open courtyards for the benefit of the abutting property. When Mr. Villard built his residence he had windows opening upon plot O, and his house was constructed in such a way as to indicate that he intended that it should remain an open courtyard. The covenants in the Holmes deeds not only granted to Holmes an easement in this courtyard, but imposed upon Holmes the obligation to keep and maintain the inner court O at or near the average level of the walk on Fiftieth street opposite the entrance to the passage or way designated on said map or survey by the letter P. The defendant having accepted the conveyance of the part of plot M conveyed to her which reserved to plot M an easement over plot O, she certainly was restricted from doing anything that would interrupt or destroy the easement thus expressly reserved and to which the land that she had purchased was subject. That easements of this character run with the land and pass by a convey-

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ance is elementary (*Hills v. Miller*, 3 Paige, 254; *Lattimer v. Livermore*, 72 N. Y. 174), and the proposed building would thus be a violation of the rights of the plaintiff for which the plaintiff was entitled to relief.

It follows, therefore, that the judgment appealed from must be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
LAWRENCE P. MINGEY, Appellant.

First Department, April 5, 1907.

**Crime — forgery in the second degree — indorsement of check — judgment of conviction affirmed.**

A defendant who knowing that the indorsement of the payee of a check has been forged, deposits the same in his private bank account for collection, is guilty of forgery in the second degree under the provisions of sections 520, 521 and 511 of the Penal Code.

A defendant who knows that the check was obtained from the drawer in payment of a debt due the payee and that the indorsement of the latter is forged, and who collects the money thereon is guilty of an intent to defraud even though he intends to apply the proceeds upon an alleged claim against the payee.

APPEAL by the defendant, Lawrence P. Mingey, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 18th day of April, 1906, convicting him of the crime of forgery in the second degree.

*George M. Curtis*, for the appellant.

*Robert S. Johnstone*, for the respondent.

INGRAHAM, J. :

On or about March 30, 1904, one E. M. Devine delivered to the Ross Lumber Company, a copartnership doing business under that name, a check for \$215, payable to its order. That check was never indorsed by or with the authority of such copartnership. Sub-

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sequently and on the day of its date there was written on the back of this check the words "Ross Lumber Co.,—L. P. Mingey, Atty.," and the check was deposited by the defendant in the Merchants' Trust Company, where he had an account to his credit. It was testified by the witnesses for the People that this check was obtained on the day it bore date by one Whitcomb from E. M. Devine in payment of what was claimed to be an indebtedness from Devine to the Ross Lumber Company. Whitcomb delivered this check to one Menton, at which time it was not indorsed. Menton wrote the words "Ross Lumber Co." and tried to get it cashed by the bank on which it was drawn, but, being unsuccessful, went to the defendant's office in Fifty-fourth street in the city of New York. When defendant came in Menton said, "I made that collection;" and the defendant said, "What collection?" Menton replied, "For the Ross Lumber Company from Devine." The defendant then said, "Tell us how you done it;" to which Menton replied, "The way we planned," or "The way we suggested; \* \* \* I have got the check." The defendant said, "Let us see it," when Menton handed it over to the defendant. The defendant took the check in his hand and said, "It is endorsed, who endorsed it?" to which Menton replied, "I did." The defendant then said to Menton, "You took an awful chance;" to which Menton replied: "I do not see how I did. \* \* \* Supposing we call a meeting of the Board of Directors and get Mr. Devine to bring down his books and bills to this office, and while they are here what is to hinder me from taking out this bill (meaning a bill which he had brought up as a receipt for the check) and the check which no doubt will be attached to it, and substitute another one which I will get from the Ross Lumber Company." To that the defendant replied, "That is up to you." The defendant then went to his desk, wrote something on the back of the check, and handed it to a man in the office, whom he told to put it through the bank. This man then took his hat and left the place. Menton did not say that he had authority from the Ross Lumber Company to indorse this check. Subsequently the check was deposited to defendant's credit, was paid by the bank upon which it was drawn, and the amount was credited to the defendant in the bank in which it was deposited. Upon this evidence the People rested.

The defendant was then called in his own behalf and testified that he was an attorney at law, admitted in 1888; that he had been counsel for Devine, the drawer of this check, and that he knew Mr. Ross of the Ross Lumber Company, who had also been his client; that after he received this check to the order of the Ross Lumber Company, he had a conversation with Ross over the telephone; that the defendant told Ross that Menton had brought the check to him and had stated that he had received authority from Ross to collect it and apply the amount of it on the amount that the Ross Lumber Company owed the Menton Company; that Ross told the defendant it was all right; to have Menton mention it, and in a couple of days he would give Menton a receipted bill for the item; that from March 30, 1904, to December, 1905, he met Ross several times but nothing was said as to there being anything wrong in regard to this check. Defendant also testified that on the same day he had a conversation over the telephone with Devine about the check; that he told Devine that Menton had brought the check to him, and that Menton had an arrangement with Ross by which he was to collect the amount from Devine and apply it to the amount the Ross Lumber Company owed the Menton Company, to which Devine said, "Oh, it is all right then." The defendant further testified that he was secretary and treasurer of the Menton Company, of which Devine was president and Menton vice-president; that after these conversations with Ross and Devine, he indorsed the check and sent it to be deposited in his bank to his credit; that as treasurer he kept the moneys of the Menton Company in this bank account; that he applied the amount realized from the check in payment of the Menton Company's debts.

The defendant's testimony was not corroborated, and in rebuttal both Ross and Devine testified that they had no conversation over the telephone with the defendant in relation to this check. Devine testified that he first knew that the Ross Lumber Company's indorsement had been forged some seven or eight months after the check had been given; that Whitcomb came to him, claiming to represent the Ross Lumber Company and, believing his statements, Devine delivered the check to him for the Ross Lumber Company.

Section 521 of the Penal Code provides that "a person who, knowing the same to be forged or altered, and with intent to

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defraud, utters, offers, disposes of or puts off as true, \* \* \* a forged \* \* \* instrument or writing, or other thing, the false making, forging or altering of which is punishable as forgery, is guilty of forgery in the same degree as if he had forged the same." By section 511 of the Penal Code it is provided that a person is guilty of forgery in the second degree who, with intent to defraud, forges "an instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased or diminished, or in any manner affected." And by section 520 of the Penal Code it is provided that the expression "forge" includes "the false making or counterfeiting of the signature of a party or witness, and the placing or connecting together, with intent to defraud, different parts of several genuine instruments."

If the defendant, knowing that the name of the Ross Lumber Company had been forged on the back of this check, deposited the same in his bank for collection, the proceeds to be credited to his private bank account, he was guilty within these provisions of the Penal Code of forgery in the second degree. The testimony seems to be substantially uncontradicted that the name of the Ross Lumber Company was indorsed on the back of this check by a person other than one connected with the copartnership doing business under that name, and without authority to make the indorsement; that the defendant wrote his name upon this forged indorsement, deposited the check to his credit, collected the proceeds, and applied such proceeds in such manner as he desired. Two of the elements, therefore, of uttering a forged instrument are substantially undisputed. The remaining questions were, whether the defendant knew that the indorsement upon the check was forged, and whether he uttered the same with intent to defraud. These questions were for the jury.

The learned trial court, in a very careful charge, explained to the jury their duty, expressly instructing them that they were the sole judges of the facts, and that it was the intention of the court to say nothing that should influence them in the least as to what the facts

were. The jury were then carefully instructed as to what the People were bound to prove to justify a conviction, and the charge was certainly as favorable to the defendant as he was entitled to.

The defendant complains of the observation of the trial judge that there was much in the evidence "which establishes beyond all cavil some of the essential facts necessary to be proved." But that was a correct statement, as the fact that Menton actually wrote the name of the payee on the back of the check, and that subsequent to that time the check was delivered to the defendant, and that he indorsed and deposited it in his bank for collection, were conceded by the defendant himself. And the learned trial judge subsequently in his charge stated to the jury the questions which were in dispute and quite correctly instructed them as to their duty in relation to the disputed question of fact. There was no exception taken to this charge, except "in reference to the doctrine and principle of uttering, and also in reference to the definition of forgery in the first and second degree." But the charge was clearly correct in these particulars. The court acquiesced in every request of the defendant to charge, except one, which was substantially a request to instruct the jury to acquit, and which was properly refused.

The learned counsel for the appellant strenuously contends that nobody was defrauded and, consequently, that there was no intention to defraud. But that was clearly a question for the jury. If this check was obtained from the maker in payment of a debt due to the Ross Lumber Company, and that company never authorized any one to indorse or obtain the money upon it, and the defendant knowing this fact collected the money on the check the indorsement upon which had been forged, he uttered the check with intent to defraud, even though he intended to apply the proceeds upon the alleged claim against the Ross Lumber Company. The maker of the check owed the Ross Lumber Company for lumber. He could only satisfy that indebtedness by paying the Ross Lumber Company. That he purported to do by giving a check to the order of that company, and to collect that money from Devine by forging the indorsement of the Ross Lumber Company defrauded Devine or Devine's bank of the money, for the transaction was not a payment of the indebtedness due the Ross Lumber Company and did not discharge such indebtedness unless the Ross Lumber Company



indorsed the check. The fact that either Devine or the bank upon which the check was drawn was defrauded by the forged instrument cannot be disputed.

The learned counsel for the defendant also insists that the defendant did not have a fair trial. This seems to be based upon the fact that the court repeatedly during the trial interrupted by asking questions of the witnesses and insisting upon the district attorney's conducting the prosecution according to the court's idea of the order of proof and the questions which should be asked. We have read over this record with care and while it is true that in a number of instances the court interposed by asking questions and interrupted the course of the trial by suggestions as to the proper method of procedure by the district attorney there is nothing in the record which suggests that all of the rights secured to the defendant were not fully preserved and protected. Counsel for the defendant cross-examined at great length and he was not interfered with in presenting his defense or in cross-examining the witnesses produced by the prosecution. A large portion of the case is taken up with conversations between the court and counsel for the defendant, but I can find nothing that the court said or did which could have prejudiced the defendant. It is difficult to see how the jury could have come to any other conclusion, and upon the defendant's own testimony he is guilty of uttering this forged check. He knew that the check had been given by Devine to pay Devine's debt to the Ross Lumber Company; he knew that the check had been obtained by Whitcomb or Menton from Devine and had not been delivered to the Ross Lumber Company; he knew that the name of the Ross Lumber Company on the back of the check had not been written by that company; nor does he pretend that he ever asked the Ross Lumber Company if they had authorized Menton or anybody else to indorse their name upon this check. The defendant was a lawyer and certainly chargeable with knowledge of the general rules in relation to forgery, and that the payment of this check would not be a payment of Devine's debt to the Ross Lumber Company unless the Ross Lumber Company either indorsed or authorized the indorsement of the check. Assuming that he asked whether the Ross Lumber Company had authorized Menton to collect the money from

Devine such an authority would not justify the assumption that the Ross Lumber Company had authorized Menton to indorse a check given by Devine to it in payment of his indebtedness. The defendant must have intended to obtain the money upon this check based upon a forged indorsement, and he must have known that the payment of the check by the bank upon that forged indorsement was an unauthorized payment by the bank, which would neither protect the bank against its depositor nor the depositor as against the Ross Lumber Company on the drawer's indebtedness to it.

There are many exceptions to evidence upon this record, but none of them are entitled to consideration. Page after page of the case on appeal consists of disputes between the counsel for the defendant and the court, and the arguments of defendant's counsel on questions of evidence, which can have no possible relation to any question presented on appeal. We wish again to express our disapproval of this practice. The insertion of this matter in the case can be of no possible benefit to the defendant and adds much to the difficulty of ascertaining what facts were proved.

We think, from the whole case, that the defendant had a fair trial and was clearly guilty, and that the judgment should be affirmed.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, J.J., concurred.

Judgment affirmed.

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FRIEDRICH NACHOD and Others, Appellants, v. CHARLES T. HINDLEY, Respondent.

First Department, April 5, 1907.

**Guaranty**—contract construed—failure of obligee to exhaust remedy on assignments made by principal—judgment overruling demurrer based upon order—permission to withdraw demurrer.

The plaintiffs had entered into an agreement with a corporation of which the defendant was secretary whereby they were to make advances to the corporation and all sales of its goods were to be made through the plaintiffs, all accounts being payable to them. In case of failure of customers to pay, the loss was to be shared equally between the plaintiffs and the corporation.

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- Thereafter the defendant secretary personally guaranteed to hold the plaintiffs harmless from any loss arising out of business transactions with the corporation. In an action against the defendant personally upon his guaranty, *Held*, that it was a good defense to allege that the plaintiffs as assignees of the collectible claims of the corporation had neglected to collect the same, failed to bring actions against the debtors and had not exhausted their remedies against them or the corporation;
- That the complaint was defective in that it did not show that the plaintiffs had been and will be unable to realize from the assigned accounts the advances made by them to the corporation;
- That an order overruling a demurrer and directing an interlocutory judgment is a decision and effective as the basis of the interlocutory judgment;
- That a judgment overruling a demurrer is erroneous in so far as it does not permit the withdrawal of the demurrer.

APPEAL by the plaintiffs, Friedrich Nachod and others, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of December, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the plaintiffs' demurrer to the separate defense contained in the amended answer.

*George T. Hogg*, for the appellants.

*Wilfrid N. O'Neil*, for the respondent.

**MCLAUGHLIN, J. :**

In January, 1904, plaintiffs' firm, as then composed, entered into an agreement with the English-Greene Company, a domestic corporation, of which the defendant was secretary, under which they were to make certain advances to the Greene Company and all sales of its goods were to be made through them; they were to send out all goods sold and all accounts were payable to them, the balance over advances and commissions being remitted by them from time to time to the Greene Company; they were to have a twenty per cent margin at all times of all outstanding accounts and, in case of the failure of any of the customers to pay their bills, the loss was to be shared equally between the plaintiffs and the Greene Company. In February, 1904, the defendant entered into an agreement with the plaintiffs, of which the following is a copy:

"NEW YORK, *February 4th*, 1904.

"MESSRS. KNAUTH, NACHOD & KUHNE,

"13 William Street, City :

"GENTLEMEN.—Referring to the memorandum of agreement which the English-Greene Company, Inc., signed with you on January 25th, 1904, I hereby confirm to you that I, as an officer in the said company, guarantee hereby to personally hold you harmless for any losses which may arise to you out of any business transactions which you have had or may have with the English-Greene Company, Inc., in consideration of your continuing advancing money to the said corporation.

"Yours truly,

"CHARLES T. HINDLEY."

In May, 1906, the plaintiffs brought this action predicated their right to recover upon the agreement just quoted. The complaint sets out the agreement, also the agreement with the English-Greene Company, and alleges that the plaintiffs made large advances to such company pursuant to the agreement; that some \$6,000 thereof remains unpaid; and that the company is insolvent and has been adjudicated a bankrupt.

As a separate defense the answer alleges that all of the accounts for goods sold and delivered by the Greene Company were assigned from time to time to the plaintiffs, who, under the agreement, were to collect the same and reimburse themselves for the advances made, bearing one-half of the loss if any proved uncollectible; that the plaintiffs still hold various accounts, the number and amount being unknown to defendant, all or most of which are collectible, and could have been collected with due diligence, but plaintiffs have failed and neglected to collect the same; that they have brought no actions against the parties owing the accounts, nor taken the proper and necessary steps to collect the same; and have not exhausted their remedies either against the parties owing the accounts or against the Greene Company.

The plaintiffs demurred to this defense upon the ground that it was insufficient in law upon the face thereof. The demurrer was overruled and leave given to the plaintiffs, upon payment of costs, to serve an amended complaint. An interlocutory judgment was entered to this effect, from which plaintiffs appeal.

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I am of the opinion that the demurrer was properly overruled. The obligation assumed by the defendant was that of a guarantor. His agreement, of course, must be read in connection with the plaintiffs agreement with the Greene Company, to which it expressly refers. His guaranty, it seems to me, binds him to repay to the plaintiffs all losses sustained by them arising under that agreement. All accounts for goods sold by the Greene Company were sent out in the name of the plaintiffs, and all payments for such goods were made to them, and after deducting their advances (which it was provided should not be more than eighty per cent of the amount of such bills), they were to remit the balance to the company, and no loss can be said to have occurred within the meaning of the agreement until the accounts collected failed to realize the amounts advanced by the plaintiffs upon them. The agreement clearly contemplated, as it seems to me, that the bills were to be collected by the plaintiffs. They delivered the goods to the customers of the Greene Company; all bills were sent to such customers in their name, and the customers paid the bills to them. The title to these claims was in the plaintiffs, and they were obligated, by reason of the arrangement between them and the Greene Company, to collect the bills in so far as they reasonably could.

The complaint is defective in that it does not show that the plaintiffs have been and will be unable to realize from the accounts the advances made to the Greene Company, and for which a recovery is sought in this action. If the plaintiffs still have in their hands accounts from which they can realize the amounts sought to be recovered, then they cannot maintain the action, and for that reason the defense pleaded is a complete and not a partial defense. This seems to have been the view of the court at Special Term, inasmuch as leave was given to the plaintiffs to serve an amended complaint.

Appellants also contend that the judgment is erroneous, in that it is not based upon a decision, but the order overruling the demurrer and directing an interlocutory judgment is, in effect, a decision and is the basis of the judgment. (*Rankin v. Bush*, 102 App. Div. 510; *affd.*, 182 N. Y. 524; *Garrett v. Wood*, 57 App. Div. 242; *Morse v. Press Pub. Co.*, 49 id. 375.)

The judgment, however, is erroneous, in so far as it does not per-

mit the plaintiffs to withdraw the demurrer. (*National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. 133.) Before the plaintiffs can serve an amended complaint they must withdraw their demurrer.

The judgment appealed from, therefore, should be modified by permitting the plaintiffs to withdraw their demurrer, and as thus modified affirmed, without costs to either party on this appeal.

PATTERSON, P. J., HOUGHTON, SCOTT and LAMBERT, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

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PIERCE, BUTLER & PIERCE MANUFACTURING COMPANY, Respondent,  
v. MAX S. A. WILSON and Others, Defendants, Impleaded with  
AMERICAN BONDING COMPANY OF BALTIMORE, Appellant.

First Department, April 5, 1907.

**Mechanic's lien — action against surety on bond given to discharge  
lien — leave of court.**

When a mechanic's lien has been discharged by the giving of an undertaking pursuant to subdivision 4 of section 18 of the Lien Law, the lienor is not required to obtain leave of court to bring action against the surety but may join him as defendant without leave.

Section 814 of the Code of Civil Procedure, requiring leave of court before bringing action for a breach of the condition of a bond, has no application to bonds given to discharge a mechanic's lien which merely take the place of the real estate upon which the lien was filed.

On the discharge of a mechanic's lien by the giving of an undertaking, the lienor may either foreclose against the debtor alone, and if he recover judgment establishing the validity of the lien may maintain an action against the surety, or he may sue in equity against the debtor and surety jointly to establish the validity of the lien and for a personal judgment against the debtor and surety.

APPEAL by the defendant, the American Bonding Company of Baltimore, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of December, 1906, upon the

decision of the court, rendered after a trial at the New York Special Term, overruling the said defendant's demurrer to the complaint.

*Abraham B. Schleimer*, for the appellant.

*Austin E. Pressinger*, for the respondent.

McLAUGHLIN, J.:

The plaintiff filed a notice of mechanic's lien against certain real estate belonging to the defendant Wilson, which was discharged before the commencement of this action by the giving of a bond or undertaking in accordance with subdivision 4 of section 18 of the Lien Law (Laws of 1897, chap. 418), upon which bond the appellant was surety. Subsequently the plaintiff brought this action to foreclose the lien, joining all persons interested as parties and demanding judgment that the lien be declared valid and the surety liable for the amount found due.

The bonding company demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, in that the giving of the bond was not sufficiently alleged, and that the complaint failed to state that leave to bring an action upon the bond had been obtained as required by section 814 of the Code of Civil Procedure. The demurrer was overruled and it appeals from the interlocutory judgment.

I am of the opinion that the demurrer was properly overruled. The allegations of the complaint as to the giving of the bond are sufficiently set forth. Nor was it necessary for the plaintiff to obtain leave of the court to bring an action against the surety before joining it as a defendant. It is true, as contended by the appellant, that section 814 of the Code of Civil Procedure provides that where a bond or undertaking has been given, as prescribed by law, in the course of an action or a special proceeding, to the People or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof, the party or other person so interested may maintain an action for a breach of the condition of the bond upon procuring an order granting leave so to do. But this section has no application to a bond given for the purpose of discharging a mechanic's lien under the statute above referred to. The condition of such bond is

"for the payment of any judgment which may be rendered against the property for the enforcement of the lien," and this clearly contemplates that an action may be maintained against the surety on the bond, without further application to the court.

Where a mechanic's lien has been discharged by the giving of a bond the lienor may do either one of two things. He may bring an action to foreclose the lien against the debtor alone, and if he recovers a judgment establishing the validity of the lien and its amount, then maintain an action against the surety on the bond (*Ringle v. Matthiessen*, 10 App. Div. 274; *affd.*, 158 N. Y. 740); or he may bring an action in equity against the debtor and the surety on the bond and obtain therein a judgment establishing the validity and amount of the lien and a personal judgment against the judgment debtor and the surety on the bond. (*Morton v. Tucker*, 145 N. Y. 244; *Mertz v. Press*, 99 App. Div. 443; *affd.*, 184 N. Y. 530; *McDonald v. Mayor, etc., of N. Y.*, 113 App. Div. 625.) The latter, however, would appear to be the better practice and this seems to have been the view of the Court of Appeals in *Morton v. Tucker* (*supra*). There, that court, after demonstrating that a similar statute (Laws of 1885, chap. 342, § 24, subd. 6) evidently intended that the bond should take the place of the property, said: "If this is so, the practice is simple. The action is in equity, brought under the statute, in which all of the persons interested, including the sureties upon the bond, are made parties. The complaint is in the usual form, with the exception that it should allege the giving of the bond and the discharging of the lien, so far as the real estate is concerned, and instead of asking judgment for a sale of the premises, it should demand relief as against the persons executing the bond for the amount that should be determined to be payable upon the lien."

This action is under the statute, really to enforce the lien of the plaintiff and to recover against the surety upon the bond, because the bond has taken the place of the real estate against which the notice of lien was filed. It is not to recover for a breach of the condition of the bond, such as is contemplated by the section of the Code above referred to. To hold otherwise would require a lienor, where a bond has been given to discharge the lien, to obtain leave of the court before he could properly bring this action, when but



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for the giving of the bond he would be under no such necessity. The Legislature in providing for the discharge of the lien by the giving of a bond, must have intended to allow the lienor the same remedies against the bond that he would have had against the property if the bond had not been given.

The judgment appealed from, therefore, should be affirmed, with costs, with leave to the appellant to withdraw its demurrer and answer on payment of the costs in this court and in the court below.

PATTERSON, P. J., HOUGHTON, SCOTT and LAMBERT, JJ., concurred.

Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below.

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NATIONAL CONTRACTING COMPANY, Appellant, v. HUDSON RIVER  
WATER POWER COMPANY, Respondent.

First Department, April 5, 1907.

**Contract — measure of damages to owner on breach of building contract — when owner's damage not governed by contract — cost of completion by owner must be fair and reasonable — when contractor entitled to offset estimated profits on work not done by owner.**

Upon the breach of a building contract by the contractor when the owner finishes the work at its own expense, the measure of the owner's damage is the difference it would have had to pay the contractor under the contract if it had performed and the actual cost of completing the work, providing the same be fair and reasonable.

Such rule of damage will be applied even though the contract provides that if the work be abandoned by the contractor or the contract be forfeited through unreasonable delay, etc., the owner may in its discretion contract with other parties for the completion of the work, in which case if the loss incurred by the owner is less than the sum payable under the contract if completed, the contractor shall be entitled to receive the difference, but if the expense of completion exceed the said sum the contractor shall pay the excess to the owner not to exceed the amount of the security for the performance of the contract. Such provision of the contract does not alter the rule of damages where the owner completes the work, but merely confers upon the owner a discretionary power to employ other contractors.

In any event when the contention that the damages were measured by such provision is presented for the first time upon appeal it cannot prevail.

When the contract does not provide for the payment of a lump sum for the entire work, but compensation is to be made at unit prices for each class of construction, the owner in completing the work must show that the actual cost of specific kinds of work was fair and reasonable.

When the contract provides that the plans may be altered and the kinds and quantities of work increased or diminished by the defendant, the burden is upon the latter in establishing a counterclaim on the breach of a contract to show that portions of the work omitted by it in completing the construction were classes of work omitted by reason of a proper change of plans. When there is no such testimony and the plaintiff proves the probable profit upon such items at the contract prices, such profits must be deducted from the increased cost of construction by the owner.

SCOTT, J., dissented in part, with opinion.

APPEAL by the plaintiff, the National Contracting Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York upon the report of a referee, dismissing the complaint and awarding the sum of \$386,185.07 upon the counterclaim.

*L. Laflin Kellogg* [*Alfred C. Pette, Philip M. Brett* with him on the brief] and *Kellogg & Rose*, for the appellant.

*Richard Lockhart Hand* [*Edgar T. Brackett and Augustus N. Hand* with him on the brief], for the respondent.

CLARKE, J.:

The action was brought to recover damages for the defendant's alleged breach of contract for the construction of a dam and power plant upon the Hudson river, in the counties of Saratoga and Warren, at a place known as Spier Falls. The defendant, claiming that the breach of contract had been by the plaintiff, pleaded as a counterclaim its damages resulting from said breach.

Upon a former trial the plaintiff recovered a judgment for the sum of \$554,680.43. Upon appeal to this court said judgment was reversed and a new trial ordered before another referee. (110 App. Div. 133.)

The learned referee upon the second trial, upon a record substantially similar, governed by the law and the interpretation of the facts as laid down by this court, dismissed the complaint. The court having held that the contract had been breached by the plaintiff and not by the defendant, upon the former record, and the referee having reached the same conclusion upon this record, it follows

that the defendant was entitled upon its counterclaim to such damages as it was able to show were the direct consequences of said breach by the plaintiff. The measure of damages in such a case is the difference between what the defendant would have had to pay to plaintiff under the contract, if the plaintiff had performed, and the actual cost to the defendant of completing the work, provided that the same was fair and reasonable.

"A party to a contract which has been broken by the other has a right to fulfill it for himself as nearly as may be, but he must not do this unreasonably as regards the other party nor extravagantly." (Suth. Dam. [3d ed.] 268.)

"The measure of damages for the breach of the defendant's covenant was the reasonable cost of the work. The city could not proceed in a reckless or extravagant manner and charge the defendant for expenses unnecessarily or unreasonably incurred." (*Mayor, etc., of N. Y. v. Second Ave. R. R. Co.*, 102 N. Y. 572.)

"The reasonable value of the work necessarily done \* \* \* to fully complete the contract according to the plans and specifications should have been deducted from the contract price." (*Powers v. City of Yonkers*, 114 N. Y. 145.)

Although the point was not in any manner raised upon the trial before the referee, it is now suggested for the first time that the general rule of damages hereinbefore set forth does not apply. It is claimed that the contract itself in paragraph "O," provides the measure of damages recoverable by the defendant upon a breach by the plaintiff. This claim was not presented by the pleadings. The complaint asked damages "not only in the value of the work done and materials and machinery purchased \* \* \* but also in the amount of profits that it would have made if it had been permitted to proceed and carry out the terms and conditions of said contract." The answer alleged abandonment and refusal to proceed by plaintiff and claimed damages by reason of the failure, neglect and refusal by the plaintiff to perform, and that defendant has been and will be put to great cost and expense in proceeding with the said dam. The reply denied each allegation of the fourth defense and counterclaim.

It does not seem that the provisions of paragraph "O" of the contract are applicable. That paragraph is as follows: "The said

contractor further agrees that if the work to be done under this contract shall be abandoned, or if at any time the engineer shall be of the opinion, and shall so certify in writing to the company, that the said work is unnecessarily and unreasonably delayed, or that the said contractor is wilfully violating any of the conditions or agreements of this contract, or is not executing said contract in good faith, or fails to show such progress in the execution of the work as will give reasonable grounds for anticipating its completion within the required time, the said company shall have power to notify the said contractor to discontinue all work, or any part thereof, under this contract; and thereupon the said contractor shall cease to continue said work or such part thereof as the said company may designate, and the said company shall thereupon have the right at their discretion to contract with other parties for the delivery or completion of all or any part of the work left uncompleted by said contractor, or for the correction of the whole or any part of said work. And in case the expense so incurred by said company is less than the sum which would have been payable under this contract if the same had been completed by the said contractor, then the said contractor shall be entitled to receive the difference; and in case such expense shall exceed the last said sum, then the contractor shall, on demand, pay the amount of said excess to the said company, on notice from the said company of the excess so due; but such excess to be paid by the contractor shall not exceed the amount of the security for the performance of this contract."

It will be noticed that that is an agreement on the part of the contractor. The contractor agrees that if it "is wilfully violating any of the conditions or agreements of this contract or is not executing said contract in good faith," etc., the company shall have power to notify it to discontinue all work and *at its discretion* contract with other parties for the delivery or the completion of all or any part of the work left uncompleted by said contractor.

The paragraph, it seems to me, conferred a power upon the defendant which it could exercise if it wished, and the provisions of the paragraph became operative only upon the exercise of that power. It meant that if, upon the report of the engineer in charge, the water company was so dissatisfied with the manner in which the contracting company was performing its contract that it notified it

to cease work and then made a new contract with another contractor, in the event that the new contract turned out to be more advantageous to the company than the old, the original contractor was to receive the difference; and if, on the other hand, it turned out less advantageous, the original contractor was to pay the difference up to \$25,000. It was in the nature of a guaranty, on the part of the original contractor, that no other contractor could do the work for less than it had agreed to do it, and if any other contractor did so do the work, the original contractor would pay the difference up to \$25,000. But it was not in consequence of any notice to the contractor by the company to cease work that the plaintiff abandoned the job and the defendant did not exercise its discretion to make a new contract after such notice to the plaintiff to cease work. There was a total abandonment by the National Contracting Company. It quit the works; it took away its tools; it breached the contract; it was not ordered off the premises; no notice was given it to cease work; it walked out, as has been found, unreasonably and wrongfully. The water power company proceeded to do the work itself, and it distinctly notified the plaintiff that inasmuch as it had abandoned the work, the defendant considered the abandonment and refusal to proceed a breach of contract, and it proposed at once proceeding with the work and would hold the plaintiff responsible for all damages which it would sustain from such breach of the contract by it. To that measure of damages the plaintiff entered no protest or objection.

It, therefore, seems to me that the provisions of paragraph "O" of the contract can in no way be applied to the situation as it now exists before this court. I am confirmed in this view by the fact that although the case has been twice tried and twice appealed, no such contention was presented, either by pleadings, motion, argument or brief, until after the submission of the case upon this appeal upon leave given, a supplemental brief was filed raising the point for the first time. It is now too late to raise this point. Cases are to be reviewed upon appeal as presented below.

Therefore, the rule of damages to be applied to this case is the general rule hereinbefore first set forth and the case must be determined in accordance therewith.

The contract under consideration in the case at bar did not pro-

vide for the payment of a lump sum for the entire work called for. It provided a unit price for each class of work and construction required. It provided specifically in paragraph "F," "That the engineer may make alterations in the line, grade, plan, form, position, dimensions or material in the work herein contemplated or any part thereof, either before or after the commencement of the construction. If such alterations diminish the quantity of work to be done, they shall not constitute a claim for damages or for anticipated profits on the work that may be dispensed with; if they increase the amount of the work, such increase shall be paid for according to the quantity actually done and at the price established for such work under this contract, or in case there is no price established, it shall be paid for at its actual cost as determined by the engineer, plus ten per cent of such cost."

The learned referee has found as matter of fact that the defendant, after the plaintiff had abandoned the work of constructing the dam and doing the other work incident thereto, went on with the work under the contract and completed it at a cost to it in excess of the amount it would have been obliged to pay the plaintiff under its contract with it, of \$383,352.60.

It appears from the evidence that said amount was arrived at in the following manner: It was in evidence that the construction of this dam necessarily involved the use of an extensive plant of machinery and apparatus for the work, consisting of cableways, derricks, hoisting engines, air compressors, stone crusher, pumps, pumping engines, and all the picks and bars and tools that are employed, locomotives, cars, and steam drills. If the plaintiff had performed, of course this plant would have been provided by it and the cost thereof would have been included among its operating expenses and entered into its estimate of the unit price at which it undertook to do the several classes of work provided for the completion of the contract. As it abandoned the work, and the defendant itself undertook its completion the defendant was required to procure said plant, and the cost thereof, about which there seems to be no controversy, was \$323,689.66. Competent proof was offered that a fair estimate of the amount of the depreciation of such plant was from 40 to 50 per cent. The referee allowed 40 per cent which amounted to \$129,475.86.

For boulder, concrete and rubble masonry the plaintiff's price

per cubic yard was \$4.55; the amount actually done by the defendant was 155,140.58 cubic yards, which would have amounted, if done by the plaintiff, to \$705,889.64. The reasonable cost of said work, as testified to by the two experts, was between \$5.50 and \$8 per cubic yard. The actual cost, as established by the evidence, was \$5.7071, making a total of \$885,408.07, making the amount of the increased cost, which was at the same time a fair and reasonable cost, \$179,518.43.

For random range ashlar the plaintiff's price per cubic yard was \$9.50. The amount done by the defendant was 10,171.82 cubic yards, which, if done by the plaintiff, would have amounted to \$96,632.29. The reasonable cost of such work, as testified to by the two experts, was from \$12 to \$30 per cubic yard. The actual cost as established was \$15.9867, which amounted for the work done to \$162,611.64, making the increased cost of the work over the contract price to the defendant, which at the same time was fair and reasonable, \$65,979.35.

The price for rock excavation as provided for by the contract was \$1.75 per cubic yard. The amount actually done by the defendant was 129,523.8 cubic yards, which would have cost, if done by the plaintiff, \$226,666.65. The reasonable cost of such work, as testified to by the two experts, was from \$1.75 to \$2. The actual cost to the defendant was \$1.6616, making the total for that item of \$215,228.51 actually spent. There was a decreased cost of this work over the contract price of \$11,438.14.

For earth excavation the plaintiff's price per cubic yard was \$.30. The amount done by the defendant was 53,437.2 cubic yards. The cost of this work if done by the plaintiff would have been \$16,031.16. The reasonable cost for this work, as testified to by the experts, was \$.45 per cubic yard. The actual cost was \$.6861, making a total of \$36,132.64. As the actual cost, however, is not proved to have been a fair and reasonable cost, the defendant should not be allowed in this item an increased cost above \$.45 per cubic yard, which would amount to \$8,015.98.

For coping, the plaintiff's price per cubic yard was \$9.75; the amount done by the defendant was 99 cubic yards, which at the plaintiff's price would have amounted to \$965.25. The reasonable cost, as testified to, was \$9, but the defendant actually did it at the

price of \$6.8774 per cubic yard, making a total of \$680.87, a decrease, therefore, of \$284.38.

The amount of the defendant's claim is, therefore, made up of the item for depreciation in value of the plant, and the five items hereinbefore enumerated. But there were numerous other classes of work provided for in the contract, and if the measure of damages is the difference between what it would have cost the defendant, if the plaintiff had performed, and the amount that it actually cost the defendant itself, we must, it seems to me, look at the whole contract. It is obviously unfair to pick out five classes of work upon which to base a claim for damages, and leave the other classes out of consideration, because it might be that as to the other classes the defendant has been enabled to do the work at a much lower price than that which it had promised to pay to the plaintiff, and if so, of course, the plaintiff was entitled to a credit therefor.

While it is true that under the contract the plans might be altered and the kinds and quantities of work increased or diminished, the burden was put upon the defendant in establishing its counterclaim to show that the classes of work called for by the contract, in regard to which it had not given evidence, were classes of work which had been omitted by reason of a proper change of plans. It gave no such testimony. The plaintiff, on the other hand, did furnish testimony as to a number of these items and as to its estimated profit upon the amount called for at the contract price. In the absence of any evidence to the contrary whatever, the claims must be taken as established, and, therefore, from the amount allowed as damages for increased cost upon the five items must be taken the estimated profits as sustained by the plaintiff's evidence as to the other items of the contract. These items are as follows: 42,227 feet of timber work, plaintiff's estimated profit \$295.58; 14,414 feet of timber work, plaintiff's estimated profit \$100.89; dressing, estimate by plaintiff 20,240 square feet, plaintiff's estimated profit \$5,060; wrought iron and steel, 203,170 pounds, plaintiff's estimated profit \$5,079.25; superstructure and power station complete, plaintiff's estimated profit \$10,000; machinery to the amount of \$307,809.54, upon which plaintiff's estimated profit was put at \$30,780.95; canal dam overflow, 353 cubic yards, plaintiff's estimated profit \$1,147.25; canal dam second cls. masonry, 233 cubic yards, plaintiff's estimated



profit \$349.50; brick work, 3,120 cubic yards, plaintiff's estimated profit \$31,200.

There are other items set up in the plaintiff's schedules, but it appears that they are included within the five items already considered in the statement of the increased cost of the work. The result being, clearly sustained by the evidence, as it seems to me, that the amount of the increased cost on three items with the addition of the amount for depreciation of the plant, amounts to \$382,989.62; that the decrease in cost on two items and the amount of the estimated profits on classes of work not included in the defendant's claim amount to \$95,735.94, for which the plaintiff is entitled to credit as against the amount of damages claimed as for increased cost, the conclusion being that the amount properly chargeable upon this evidence, as damages accruing to the defendant by reason of the breach of contract by the plaintiff, was \$287,253.68.

It follows, therefore, that the judgment appealed from should be reversed and a new trial ordered, with costs to abide the event, unless the defendant stipulates to modify the judgment by reducing the amount found due to the above sum of \$287,253.68, with the appropriate change of the interest sum, in which event the judgment appealed from will be so modified, and as modified affirmed, without costs in this court.

PATTERSON, P. J., INGRAHAM and LAUGHLIN, JJ., concurred.

SCOTT, J.:

I should find no difficulty in concurring in the affirmance of this judgment, as modified in accordance with the views of Mr. Justice CLARKE, were it not for the provisions of clause O of the contract respecting the damages to be paid by the contractor in case of his abandonment or non-fulfillment of the contract. That clause reads as follows:

"O. The said contractor further agrees that if the work to be done under this contract shall be *abandoned*, or if at any time the engineer shall be of the opinion and shall so certify in writing to the company that the said work is unnecessarily and unreasonably delayed, or that the said contractor is wilfully violating any of the conditions or agreements of this contract, or is not executing said contract in good faith, or fails to show such progress in the execu-

tion of the work as will give reasonable grounds for anticipating its completion within the required time, the said company shall have power to notify the said contractor to discontinue all work or any part thereof under this contract; and thereupon the said contractor shall cease to continue said work, or such part thereof as the said company may designate, and the said company shall thereupon have the right, at their discretion, to contract with other parties for the delivery or completion of all or any part of the work left unexpended by said contractor, or for the correction of the whole or any part of said work. And in case the expense so incurred by said company is less than the sum which would have been payable under this contract if the same had been completed by said contractor, then the said contractor shall be entitled to receive the difference; *and in case such expense shall exceed the last stated sum, then the contractor shall on demand pay the amount of said excess to the said company on notice from the said company of the excess so due; but such excess to be paid by the contractor shall not exceed the amount of the security for the performance of this contract.*"

As I read that clause it is intended to cover and provide for the cases in which the water company would be justified in treating the contract as at an end and taking the work into its own hands. This it might do either (1) if the contractor abandoned the work; or if (2) the work should be unnecessarily or unreasonably delayed; or if (3) the contractor should willfully violate any of the conditions or agreements of the contract; or if (4) the contractor should not be executing the contract in good faith; or if (5) the contractor should fail to show such progress as would give a reasonable ground for anticipating the completion of the work within the required time. In case any of these conditions arose the company reserved the right to treat the contract as forfeited and to proceed with the work itself. In examining these conditions it will be seen that the first, to wit, abandonment of the work, was of such a nature that its existence, if it should exist, would be patent and apparent, while the other conditions implied the formation of an opinion based upon patent facts. Thus if there were delay, it would be a matter of opinion whether or not that delay was necessary and reasonable; if it was claimed that the contractor willfully violated the terms of his contract, a question of judgment or opinion would at once arise, and

so as to the good faith in executing the contract or the probability of completing the work in time, a like question of judgment or opinion was necessarily involved, while an abandonment of the work by the contractor would be visible and apparent, as a fact, to any observer, and involved no exercise of judgment or expression of opinion. So we find in the clause quoted a provision that as to any of the possible breaches by the contractor, except abandonment of the work, the action of the company in electing to terminate the contract must be predicated upon a certificate of the engineer, by another clause created arbiter between the parties, that in his opinion the contractor has failed in some of the particulars mentioned in the clause, but in case of an abandonment of the work no such certificate is provided for, for the obvious reason that no such certificate would be appropriate or necessary to establish a patent fact. By the strict letter of the clause, and from the nature of the case no certificate of the engineer expressive of his opinion is required, when, as in this case at bar, the contractor's default consists of an abandonment of the work. The plaintiff's liability rests on the finding that it unwarrantably abandoned the work, and this was the position assumed by the defendant when, under date of December, 1900, it finally notified the plaintiff that the latter had abandoned the work, and that the water company elected to treat such abandonment as a breach of the contract, and would itself at once proceed with the work. It seems to me that there was then presented the precise condition contemplated by and provided for in the clause quoted above to wit, an abandonment of work by the contractor, and election by the water company to treat such abandonment as a breach of the contract; a notification of such election to the contractor, and the completion of the work by the company. There was no certificate by the engineer, but as already shown that was not required where there was a complete abandonment.

The consequences following upon an election by the water company to terminate the contract are precisely defined by the clause quoted. It was authorized to contract with other parties for the completion of all work left uncompleted by the contractor, and this the company proceeded to do. The clause then provided, as is usual in such contracts, that if the expense incurred by the company in completing the work should be less than would have been payable

to the contractor if it had completed it, then said contractor should be entitled to receive the difference; and if the expense should exceed the amount which would have been payable to the contractor if it had completed the work according to the contract, then said contractor should, on demand, pay to the company the difference. Then follows an unusual clause, which as I consider limits the amount which defendant may recover under its counterclaim. It reads as follows: "but such excess to be paid by the contractor shall not exceed the amount of the security for the performance of this contract." This clause is, as has been said, unusual, and, as the event discloses, affords the defendant most inadequate damages for the contractor's default, but we cannot disregard it merely because it is unusual, or will result in providing inadequate relief. It is not our place to make a contract for the parties, but merely to interpret and enforce the contract which they made for themselves.

It is idle to speculate upon the reasons which led to the insertion of that clause in the contract. It is sufficient that it is there, and it would be difficult to compose a phrase which would more effectually or completely limit the amount of damages to be paid by the contractor under the circumstances disclosed by the record before us. Unless, therefore, the plaintiff has in some way waived the right to insist upon this limitation of its liability, I can see no escape from its application. It is suggested that it has waived it by its pleadings, and by its course in this litigation. The complaint alleges the making of the contract, its breach by the defendant and demands damages. The answer denying plaintiff's allegations sets up a counterclaim alleging abandonment of the work by plaintiff; that defendant has thereby suffered damages, and asks judgment therefor. The reply is a general denial of the allegations of the counterclaim. The plaintiff thereby denied both that it had broken its contract and that defendant had suffered damages thereby. The special clause under consideration could not have been pleaded either as a complete or a partial defense. It went not to the defendant's right to recover damages, but merely placed a limit upon the amount which could ultimately be recovered. It, therefore, had no proper place in the reply, and its omission therefrom cannot be construed into a waiver.

It certainly seems to be a surprising fact that in the six years

during which this case has been pending, including two long trials before referees, three appeals to this court and one appeal to the Court of Appeals, the attention of the court should not have been called to this particular clause in the contract until after the oral argument on this appeal, but that circumstance does not, in my opinion, justify us in holding that the plaintiff had waived its benefit. The first appeal to this court, and the appeal to the Court of Appeals, dealt only with a demurrer to the answer. On the first trial judgment went for the plaintiff, and only the plaintiff's right to recover was before this court on the appeal from that judgment. Of course no question then arose respecting any limitation there might be in the contract affecting a possible recovery by defendant against plaintiff.

Upon the last trial only did the question as to how much defendant should recover from plaintiff become important. The plaintiff might well then have called the attention of the referee to the limitation contained in clause O of the contract, but if it had done so, while a different judgment might have been entered, no different issues would have been presented for trial. The record shows that the plaintiff's position throughout was that it was the defendant who was in fault, and the plaintiff who was entitled to damages, and notwithstanding the limitation upon defendant's recovery, if it should recover, it was still necessary that defendant should offer proof of its damages, for the clause quoted was not a stipulation for liquidated damages, but merely a limitation upon the amount to be recovered by defendant in case of a breach by plaintiff. The defendant could not recover, in any event, more than the amount as limited, and could not recover even that, unless it proved so much.

In point of fact the defendant proved vastly more, and, in my opinion, this being an action triable by a referee, it is unnecessary to direct a new trial, but the judgment should be reduced to \$25,000, with interest from date of service of the counterclaim, and the costs included in the judgment, and as so modified affirmed, without costs in this court.

Judgment reversed, new trial ordered, costs to appellant to abide event unless defendant stipulates to reduce the judgment as indicated in opinion, in which event judgment as so modified affirmed, without costs. Settle order on notice.

ISAAC P. SMITH, as Executor of the Last Will and Testament of CHARLES G. HAVENS, Deceased, and Trustee under Said Will, Respondent, v. HAVENS RELIEF FUND SOCIETY and Others, Respondents, Impleaded with HARRIET AVERY PARMLY and Others, as Executrices, etc., of ANGELICA M. CLARK, Deceased, and Others, Appellants.

First Department, April 5, 1907.

**Will — bequest to charitable uses — when benevolent corporation entitled to take.**

The Havens Relief Fund Society, incorporated in 1870 for charitable purposes and endowed with special powers by chapter 301 of the Laws of 1871, obtained a valid corporate existence.

In any event the validity of its corporate existence cannot be attacked collaterally in an action by a testamentary trustee holding a trust estate for the benefit of that institution asking a determination of the validity of the trust and for a settlement of his accounts. The question of the legal existence of the corporation can only be raised by the sovereign power to which the corporation owes its life in some proceeding for that purpose brought by and on behalf of the sovereignty itself.

Even if defects exist in proceedings for an incorporation, the defect may be cured by subsequent legislation.

Chapter 301 of the Laws of 1871, providing that the Havens Relief Fund Society may take gifts by will from those named in the certificate of incorporation without being limited to the amounts then limited by law, exempts such corporation from the limitations prescribed by section 6 of chapter 319 of the Laws of 1848 and chapter 360 of the Laws of 1860, and enables it to take bequests from its original incorporators without limit.

APPEAL by the defendants, Harriet Avery Parmly and others, as executrices, etc., and others, from a final judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 7th day of March, 1906, confirming the report of a referee, with notice of an intention to bring up for review upon such appeal an interlocutory judgment in this action entered on the 6th day of December, 1904.

*Alfred G. Reeves*, for the appellants.

*George M. Bayne*, for the plaintiff, respondent.

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*Richard Lockhart Hand* [*Leonard S. Wheeler* with him on the brief], for the respondent Havens Relief Fund Society.

*Richard Lockhart Hand* [*Augustus N. Hand* with him on the brief], for the respondent Jones, as executor.

*Frank W. Stevens*, for the respondents Stephens.

*Harry E. Newell*, for the respondent Costello.

CLARKE, J. :

This action was brought by the plaintiff as executor of the last will and testament of Charles G. Havens, deceased, and trustee under his will. The purpose of the action was to have determined whether or not certain provisions of the will creating annuities and providing for their payment by a charge in the first instance upon certain real estate, created valid or invalid trusts. The plaintiff also desired to render his account as executor and trustee and to have the same judicially settled.

By their answers a number of the defendants attack the whole will and especially the 20th and 21st clauses thereof and ask judgment declaring the various gifts and devises in the will contained to be illegal and void.

Charles G. Havens, the testator, died in the city of New York on January 7, 1888, in his seventy-ninth year, leaving a last will and testament dated July 20, 1886. He was a bachelor, had been for many years a practicing lawyer, and left a substantial fortune. Upon the probate proceedings all the heirs at law and next of kin of the testator were cited and many of them, including certain of the defendants-appellants, answered the petition for probate, setting forth substantially the same objections to the will set up in their answers to the complaint in this action. After a trial the will was sustained by the surrogate (*Matter of Havens*, 6 Dem. 456), and a decree was entered admitting the will to probate and establishing it as a will of real and personal property.

From said decree an appeal was taken to the General Term of the Supreme Court, which appeal was subsequently dismissed. Under this decree, letters testamentary were issued to Clifford A. Hand, and thereafter and until his death in August, 1901, Mr. Hand, as such executor, carried out the provisions of the will and disbursed

over \$1,000,000 to the legatees and annuitants and the residuary legatee, the Havens Relief Fund Society. Upon the death of Mr. Hand, letters testamentary were issued to Isaac P. Smith, the plaintiff, who brought the present action.

On the 31st of December, 1870, Mr. Havens and seven associates signed and verified a certificate of incorporation of the Havens Relief Fund Society, stating that " \* \* \* desiring to associate ourselves for benevolent and charitable purposes and to be an incorporated society as authorized by the laws of the State of New York, do hereby certify in writing: \* \* \*. Second: That the particular business and objects of such society shall be the receipt of such money and property as shall be voluntarily contributed, paid, conveyed, devised, bequeathed or in any way transferred to the Society, and the investment of the same to produce an income and the application of the income from time to time through corporate or private agencies to the relief of poverty and distress and especially the affording of temporary relief to unobtrusive suffering endured by industrious or worthy persons, but including the bestowal and distribution of any part of such income to and among benevolent and charitable institutions, objects or persons such as shall be deemed most useful and deserving or judicious, considering the different modes of application and expenditure or use of funds and the practical results, and including the right to employ and superintend almoners without being required or undertaking to act immediately or directly as almoners, and generally in respect to any property received by deed or will for any benevolent or charitable use or purpose including the right to comply with the directions of the donor in regard thereto."

On the same day a justice of the Supreme Court, in writing, consented that the certificate be filed and the society mentioned be incorporated and approved of such filing and incorporation, and upon the 3d of January, 1871, the original was filed in the office of the Secretary of State and in the office of the clerk of the city and county of New York.

On April 5, 1871, the Legislature passed chapter 301 of the Laws of that year, which, by its terms, took effect immediately, entitled "An Act increasing the corporate powers of 'The Havens Relief Fund Society.'" The act provided: "Section 1. The Havens Relief



Fund Society, incorporated under the laws of this State, and whose purposes or business and objects are" — setting forth in *ipsisimis verbis* the language of the hereinbefore recited certificate of incorporation — "is hereby authorized to receive by gift, devise, bequest, subject to all provisions of law relative to devises and bequests by last will and testament or other voluntary contribution, any money or property, and to so apply the same to the said purposes of its incorporation, or any or either thereof, without being limited to the amounts now limited by law, and to continue the incorporation so long as may be requisite thereto; provided, however, that the amount of such contributions which may be so received from persons other than those named in the certificate of its incorporation, shall not exceed the limit allowed by law for gifts or contributions to associations or incorporations for benevolent and charitable purposes."

Mr. Havens was the originator of the scheme of this society and the certificate of incorporation and the act alluded to were procured at his instance and request. The society had been in active existence from the time of its incorporation in 1871 for seventeen years at the time of testator's death and during that period he had contributed for its use upwards of \$25,000. In the 20th clause of his will, executed July 20, 1886, about eighteen months before his death, it was provided that "All the rest, residue and remainder of my estate and property, real and personal, and wheresoever situate, of or to which I may die seized, possessed or entitled, I give, devise and bequeath the same to my said executors upon trust to sell and dispose of the same and convert the same into cash or cash securities or investments and pay over the net proceeds thereof to the 'Havens Relief Fund Society,' a corporation organized under the laws of the State of New York (of which I am and from its beginning have been a trustee), to be held and applied by the said society for the purposes of the incorporation thereof, it being my wish, however, that the principal be kept invested and only the income distributed or expended for the charitable purposes of the society. And in this residuary property shall pass and be included all estate and funds and property which by decease of legatees or from other cause shall not be actually required to satisfy the hereinbefore contained provisions of this my will, and all principal sums which shall cease to be required to produce and pay annuities or other charges or sums,"

In affirming the judgment here appealed from, it would be unnecessary to add anything to the able opinion of the learned court at Special Term (44 Misc. Rep. 594), which we approve and adopt, were it not for the fact that two points have been elaborately presented upon the argument and in the briefs before us, in regard to which we deem it proper to add a word to the matters discussed in the opinion below.

The appellants claim that the Havens Relief Fund Society did not attain valid corporate existence under its certificate of incorporation nor under chapter 301 of the Laws of 1871.

It is quite clear that the validity of the corporation cannot be attacked in this proceeding. The Havens Relief Fund Society was created by filing the certificate duly approved in the manner required by law, and in the same year was recognized by legislative enactment reciting the objects of its incorporation and increasing its powers. It commenced the open performance of its functions under color of the authority thus invoked in 1871, and had so acted for seventeen years at the time of testator's death, and was still so acting at the time of the commencement of this suit in 1903, thirty-two years after its incorporation. There is "almost unanimous consensus of judicial opinion \* \* \* that the rightfulness of the existence of a body claiming to act, and in fact acting, in the face of the State as a corporation, cannot be litigated in actions between private individuals or between private individuals and the assumed corporation, but that the rightfulness of the existence of the corporation can be questioned only by the State; in other words, that the question of the rightful existence of the corporation cannot be raised in a collateral proceeding." (10 Cyc. 256. See, also, 8 Am. & Eng. Ency. of Law [2d ed.], 747, 754, 758.)

In *Riker v. Cornwell* (113 N. Y. 115), when the question was whether a certain corporation could take under a will, the court said: "Even if defects existed in the proceedings for incorporation, the passage of subsequent acts by the Legislature was a recognition of its incorporation and cured such defects." In *Matter of Trustees of Congregational Church, etc.* (131 N. Y. 1) the church had petitioned the surrogate to compel the payment to it of a legacy under a will. The court said: "Even if a cause of forfeiture appears that cannot be taken advantage of or enforced in a proceeding like this. That question can be raised only by the sovereign

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power to which the corporation owes its life, in some proceeding for that purpose by or in behalf of the sovereignty itself."

To the same effect are *People v. Ulster & Delaware R. R. Co.* (128 N. Y. 240) and *Coze v. State* (144 id. 396).

There is no doubt that the society is a valid existing corporation. It came within the purview of the act of 1848, chapter 319, as a benevolent and charitable society, its certificate complied with all the formalities of the law, it has been expressly recognized as an existing corporation by the Legislature and its powers increased. There would seem to be no ground for an attack upon it even by the State. There is none by private individuals.

Although a legal and valid corporation the question still remains has it the power to take under this will? Chapter 319 of the Laws of 1848, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies," the act under which the certificate of incorporation was made, provided (as amended by Laws of 1857, chap. 302, and Laws of 1861, chap. 239) that "any five or more persons of full age, citizens of the United States, a majority of whom shall be citizens of, and residents within this State, who shall desire to associate themselves together for benevolent, charitable, literary, scientific, missionary, or mission, or other Sabbath school purposes," should, upon making and filing the prescribed certificate, be a body politic and corporate. The act provided that the corporation should in law be capable of taking, receiving, purchasing and holding real estate for the purposes of the incorporation and for no other purpose, to an amount not exceeding \$50,000 in value, and personal estate for like purposes to an amount not exceeding \$75,000 in value, but the clear annual income from such real and personal estate should not exceed the sum of \$10,000. Section 6 of said act provided that any corporation formed under this act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of \$10,000, provided no person leaving a wife or child or parent shall devise or bequeath to such corporation more than one-quarter of his estate after the payment of his debts, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two

months before the death of the testator. Chapter 360 of the Laws of 1860 provided that no person having a husband, wife, child or parent shall by his or her last will and testament devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more.

These limitations existing at the time of the incorporation of this society, the Legislature by the act above alluded to, chapter 301 of the Laws of 1871, provided that this society "is hereby authorized to receive by gift, devise, bequest, subject to all provisions of law relative to devises and bequests by last will and testament or other voluntary contribution, any money or property \* \* \* without being limited to the amounts now limited by law, \* \* \* provided, however, that the amount of such contributions which may be so received from persons other than those named in the certificate of its incorporation, shall not exceed the limit allowed by law for gifts or contributions to associations or incorporations for benevolent and charitable purposes."

Mr. Havens died a bachelor without leaving a wife, child or parent and his will was made eighteen months before his death, so that the provisions of neither of the statutes cited, so far as the limitation was fixed upon a proportionate share of his property, apply. As I read the act of 1871 the words "subject to all provisions of law relative to devises and bequests by last will and testament" must be confined to those provisions in the statute cited which prohibit, in case of a man leaving certain near relatives, and in a will made less than two months before his death, more than the specified proportion of his estate to a charitable corporation. The other provisions of the act of 1848 which limit the devise or bequest to property the clear annual income of which shall not exceed \$10,000, as well as the other limitations in the said act as to the amount that the society may hold, have no force and effect, because the very purpose of this act was to increase the corporate powers of this institution, and it expressly provided that it might take without being limited to the amounts now limited by law so far as the persons named in the certificate of incorporation were concerned.

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If this interpretation is not correct, it is impossible to discover any reason whatever for the passage of the act. While it is quite true that the act of 1848 not only limited the amount of the property which could be devised or bequeathed, but also the amount of property which the corporation could take and hold, the Legislature had the same power to remove these restrictions as it had to impose them, and that power has been exercised from time to time both by general and by special statutes. Before the death of the testator, the Legislature had by chapter 641 of the Laws of 1881 increased the amount of real and personal estate which a charitable association could take and hold to \$400,000 in value, with clear annual income of \$50,000, but we have no concern with the general statutes. The Legislature conferred upon this corporation the power to take and hold from Mr. Havens, one of the persons mentioned in the certificate of incorporation, property to an unlimited amount.

The other questions involved in this appeal have been so admirably disposed of in the opinion of the learned court below that nothing further need be added.

The judgment appealed from should be affirmed, with costs to the respondents separately appearing, payable out of the estate.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment affirmed, with costs to the respondents separately appearing, payable out of the estate. Settle order on notice.

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JOHN C. WILMERDING and Others, Respondents, v. POSTAL TELEGRAPH-CABLE COMPANY, Appellant.

First Department, April 5, 1907.

**Principal and agent — when messengers of telegraph company clothed with apparent power to collect — when overpayments made to messengers on forged bills may be recovered from the principal.**

An employer who puts it within the power of his employee to defraud a third person by intermingling genuine and fraudulent bills and collecting money thereon, may be held responsible by an innocent third party for the dishonesty of the employee.

Thus, when a telegraph company has been accustomed to send its messengers to collect small sums due for messenger service and the messenger forges bills which he intermingles with the genuine bills and presents to the customer's cashier in charge of the petty cash for payment, the customer may recover the amount of the payments made on the forged bills.

Although such messenger is not the general agent of the company, yet when he is empowered to collect, that act is within the scope of his authority and the principal is bound.

The fact that the act of the agent is *ultra vires* is immaterial if the act be within the scope of his authority.

The customer making payments under the circumstances aforesaid is entitled to recover, although he might by an investigation have discovered the forgery. LAUGHLIN and SCOTT, JJ., dissented in part, with opinion.

APPEAL by the defendant, the Postal Telegraph-Cable Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 14th day of June, 1906, upon the decision of the court rendered after a trial at the New York Trial Term, the jury having been dismissed.

*Edmund L. Mooney* of counsel [*William W. Cook*, attorney], for the appellant.

*Edwin Blumenstiel* of counsel [*Blumenstiel & Blumenstiel*, attorneys], for the respondents.

CLARKE, J.:

The plaintiffs are members of a copartnership known as Wilmerding, Morris & Mitchell, engaged in business in the city of New York. The defendant is a domestic corporation conducting a general telegraph business. The course of dealing between plaintiffs and defendant, continuing for about ten years, has been as follows: When the plaintiffs desired to send a telegram they would ring the messenger call in their store and a messenger would be dispatched from the local office of the defendant in the neighborhood, under the charge of one Morrell, who would receive the message and carry it to the telegraph office where it would be dispatched in the regular course of business. Upon the following day a messenger from the defendant's office would present to plaintiffs' assistant cashier in charge of the petty cash, one White, a printed slip or form headed "message memorandum," containing the date and the words

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"To Postal Telegraph-Cable Company. For convenience in verifying accounts, please preserve the following items of messages sent." There would then follow "To," the address being written in, followed by the amount of the charge and opposite the word "signature," inclosed in brackets, the name of the person sending the message. These slips were made out by the telegraph company and the name appended thereto was not a signature but was for the purposes of identification and in the genuine slips was written by the agent in charge of the defendant's office. Upon the presentation of the slip, which performed the function of a bill, to the cashier in charge of the petty cash, the amount called for thereon was given to the messenger in payment of the services rendered and the slip was kept as a voucher by the plaintiffs.

During the seven months under consideration in this action a large number of slips upon which payments were made were presented by and the amounts called for thereon paid to a messenger of the defendant, who was between sixteen and eighteen years of age, named Murphy, and the balance by one other boy not particularly described or identified, but it appears that all of the slips were presented by one or other of these two boys sent by the defendant and known to the assistant cashier. During this period 517 slips were thus presented for payment and \$709.49 were paid thereon to these two messengers. Upon investigation it appeared that 199 of these slips upon which were paid \$117.50 were slips made out by the operator, Morrell, and represented charges for services by the defendant for transmission of telegrams for the plaintiffs and for which the defendant gave credit to the plaintiffs. Three hundred and eighteen slips upon which \$592.99 were paid to the messenger boys were forged memoranda and were fictitious in that no services were rendered by the defendant for the plaintiffs in accordance with the tenor of said forged or fictitious memoranda. It is for said sum so paid that this action was brought and for which judgment in favor of the plaintiffs has been entered, from which this appeal is taken.

The question is, is the defendant responsible to the plaintiffs for the dishonesty of its messengers? It is conceded that so far as the genuine slips are concerned, made out by the defendant's agent, Morrell, in charge of its office and given by him to the messengers,

they were thereby constituted the agents of the defendant for the purpose of collecting from the plaintiffs the amounts due for services rendered as appeared upon the face of such slips; that if after payment by the plaintiffs to such messengers upon such genuine slips the messengers had appropriated the sums paid themselves, or having transmitted the money to the office, the agent there in charge had appropriated it to himself the defendant would have been liable, for the collections would have been within the direct scope of the employment of the agent and the principal, for the agent's wrongdoing, would have been obliged to respond. But the defendant claims that these messengers were not in any sense the general agents of the defendant; that their employment was limited to the presentation of the genuine slips as given to them by the general agent, Morrell, and the collection of the sums called for thereby, and that when they forged slips and upon such forged slips collected and appropriated the sums apparently called for they acted independently and outside of their respective agencies, and that, therefore, the defendant is not liable for such fraudulent conduct.

It seems to me that this contention is not sound; that the liability of the principal does not depend upon the general agency of the agent but upon the question whether the acts done were within the apparent scope of the authority of the agent, and that when it had clothed these messengers with the power to present slips and receive payment therefor, it is responsible for the wrongful acts of such agents committed in that kind of work. The fictitious slips were intermingled with the genuine. They were both presented by the same boys to the same assistant cashier in the same ordinary way in which the dealings between the parties had been conducted for a very considerable period of time. The plaintiffs had the right to assume that the agents of the defendant, admittedly employed by it and clothed with the power to collect money on the presentation of slips, were honest and that the slips presented by them were genuine.

The assistant cashier testified that at the time he paid these slips he "thought they were in the operator's handwriting — seeing that handwriting every day I got accustomed to it looking at it." He did not send the telegrams or ring for the messengers. He was in



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charge of the petty cash disbursements of the business. He had been in the habit of receiving these slips from these same boys and of paying them for a long time, and there was nothing which excited his suspicion, there was nothing out of the common which put him upon his inquiry.

An employer who has put it within the power of his employee to defraud a third person by intermingling fraudulent and genuine bills and collecting money therefrom, should be held responsible to an innocent third party for the dishonesty of his employee.

It is unnecessary to cite numerous authorities because, as it seems to me, the recent case of *Birkett v. Postal Telegraph-Cable Co.* (107 App. Div. 115; affd. unanimously, 186 N. Y. 591, without an opinion) is conclusive. The defendant seeks to distinguish that case from the one at bar, because in the *Birkett* case the agent was a general agent in charge of the office of the defendant. Conceding that the messengers in the case at bar were not the general agents of the defendant, yet, when acting within the scope of their authority, the same rule applies as to a general agent, and, as to third parties, when a special agent acts within the apparent scope of his authority the rule of responsibility is the same. These messengers having the direct authority to collect upon genuine slips, presenting, intermingled with said genuine slips, forged slips not distinguishable upon ordinary examination from the genuine slips, their acts were within the apparent scope of their authority and hence the *Birkett* case is applicable. In that case Harrington was the agent in charge of the defendant's office in Penn Yan. Birkett, like the plaintiffs in the case at bar, was a regular customer, but, instead of having the bills presented upon the next day after the transmissal of the message as in this case, an itemized statement was presented to him each month on blanks furnished by the defendant for the purpose and which he paid mainly by check as they were rendered. He accidentally discovered an overcharge which led to an investigation disclosing that he had been systematically mulcted by Harrington, who confessed his guilt and absconded. An examination proved the extent of these false accounts, consisting of fictitious items and charges, to be \$2,480.24. Harrington had remitted proper sums and rendered correct statements of the

account to the defendant. Mr. Justice SPRING said: "The rule of law governing this case is elementary. A principal is liable to a third person for the misconduct of his agent committed in the line of his employment, even though the offense was in excess of his authority 'and the principal did not authorize, justify or know of it.' (Citing cases.) Conceding this rule of law, the appellant contends that Harrington was not acting in the line of his employment in making false entries in the accounts rendered to the plaintiff. \* \* \* He was acting within the scope of his agency in receiving the money for the benefit of the defendant. If the plaintiff had paid the exact amount due and Harrington had misappropriated it, the plaintiff could not have been compelled to respond over again on account of the misconduct of Harrington. Of course, Harrington was not authorized to collect money of the plaintiff for telegrams never transmitted, but it was his duty to collect the sums actually due for their transmission. If he collected more than was due, he did that because of his agency. The agent in his dealings with the plaintiff turned out to be dishonest while acting in that capacity. His delinquency does not exonerate the defendant to the plaintiff, who relied upon the manifest authority of Harrington. The principal cannot so easily evade liability for the misdeeds of its agent. \* \* \* The rule here applicable is founded on the old maxim that the principal is responsible for his agent, not the innocent third person. The plaintiff was furnished with the tariff books of the defendant, and by examination of each statement with the tariff rates could have ascertained that he was being cheated. It is urged that he was negligent in failing to make these examinations and should not, therefore, be permitted to recover. The plaintiff was not obliged to act on the assumption that Harrington was defrauding him. \* \* \* (He) had a right to assume he was honest and (was) not called upon to enter into any inspection of the items of his accounts for the purpose of discovering either fraud or mistake."

Applying the principles there laid down to the facts appearing in the case at bar, there seems to be no escape from the proposition that the defendant is liable. All the cases which have held the principal responsible for the dishonest acts of the agents have assumed that the said acts were *ultra vires*, but the responsibility

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of the principal was based upon the fact that he had lodged the power in the agent to commit the act.

The appellant urges that the plaintiffs' neglect in not discovering the fraud committed upon them precluded a recovery.

"In an action to recover back money paid under a mistake of fact, it is no defense that by the exercise of proper diligence plaintiffs might have avoided the error, or that defendant cannot be restored to his original position upon paying back the money." (10 Abb. Cyc. Dig. 809.) "It seems from a long series of cases \* \* \* that where a party pays money under a mistake of fact he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself." (*Kingston Bank v. Eltinge*, 40 N. Y. 397.) "If the money 'is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact.'" (*Union Nat. Bank of Troy v. Sixth Nat. Bank of N. Y.*, 43 N. Y. 455.) "Negligence upon the part of one who by mistake pays to another a sum of money to which the latter is not entitled does not defeat the right of action of the former to recover back the money so paid." (*Lawrence v. American Nat. Bank*, 54 N. Y. 433.)

The appellant claims, however, that a new rule has been established by *Critten v. Chemical Nat. Bank* (171 N. Y. 219). In that case the plaintiffs kept a large and active account with the defendant, and the action was to recover an alleged balance of a deposit due to them from the bank. Plaintiffs had in their employ a clerk whose duty it was to fill up the checks which it might be necessary for the plaintiffs to give in the course of business, to make corresponding entries in the stubs of the check book, present the check to one of the plaintiffs for signature, together with the bills in payment for which they were drawn. This clerk from time to time, after the checks had been so signed, obliterated by acids the name of the payee and the amount specified, made the checks payable to cash and raised the amount. He would draw the money on the check so altered from the defendant's bank, pay the bill for which the check was drawn, in cash, and appropriate the excess. The court said: "The relation existing between a bank

and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor;" and, after speaking of the custom of balancing the pass book and the return of the checks as vouchers, said: "Considering that the only certain test of the genuineness of the paid check may be the record made by the depositor of the checks he has issued, it is not too much in justice and fairness to the bank to require of him when he has such a record, to exercise reasonable care to verify the vouchers by that record."

It seems to me that the doctrine of that case should not be extended; that the relations of a depositor to his bank upon which he draws checks, entering the amounts therefor upon the stubs in his check book, which checks are fraudulently altered by one of his own employees, who presents the same to the bank and receives the money thereon, said check being returned to the depositor with his pass book when balanced, presents a very different case from the one at bar. Here one employee of a business concern sends telegrams in the regular course of business; no entry is made of the amounts due thereon, as that is fixed by the telegraph company. The next day bills are presented by a credited agent of the telegraph company, some genuine and some false, all bearing the same general appearance, for small amounts, to the cashier in charge of the petty cash. The only way of verifying the bills is by comparison with the letter-press copy book kept by the department sending the telegrams. The small amounts on each bill, the regular course of dealing, the apparent authenticity, the fact that the orders to pay are drawn, not by the plaintiffs, but by the defendant, seem to me to differentiate the two cases.

Further, the *Birkett Case* (*supra*) was decided by the Court of Appeals long after the decision in the *Critten* case. In the *Birkett* case the point now urged seems to have been raised. Said Mr. Justice SPRING: "The plaintiff was furnished with the tariff books of the defendant, and by examination of each statement with the tariff rates could have ascertained that he was being cheated. It is urged that he was negligent in failing to make these examinations and should not, therefore, be permitted to recover. The plaintiff was not obliged to act on the assumption that Harrington was defrauding him. \* \* \* (He) had a right to assume he was honest

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and (was) not called upon to enter into any inspection of the items of his accounts for the purpose of discovering either fraud or mistake."

It would have been as easy for Birkett to have discovered the fraud or mistake in the bills rendered by the agent of this defendant in that case as it would have been for the plaintiffs to have discovered the frauds of the agent of this defendant in this case, and as the learned Court of Appeals, with the question fairly presented, did not apply the doctrine of the *Critten* case to the *Birkett* case, it follows that it does not apply to this case.

The judgment appealed from should be affirmed, with costs.

PATTERSON, P. J., and INGRAHAM, J., concurred; LAUGHLIN and SCOTT, JJ., dissented.

LAUGHLIN, J. (dissenting):

I dissent from the affirmance of this judgment upon the ground that in my opinion the plaintiffs should have discovered that they were paying bills for telegrams which they had not sent, and that the defendant, which neither authorized the collection of these fraudulent bills nor received the money, should not be compelled to pay the damages which might have been avoided by the exercise of reasonable care on the part of plaintiffs in the supervision of their own affairs.

SCOTT, J., concurred.

Judgment affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. LAWRENCE FOGARTY, Appellant, v. JOSEPH CASSIDY, as President of the Borough of Queens, Respondent.

First Department, April 5, 1907.

**Municipal corporations — mandamus by assistant foreman of highways asking reinstatement — such foreman liable to discharge — fact that relator, a volunteer fireman, was protected from removal must be alleged.**

An assistant foreman of highways in the borough of Queens is subject to removal under section 1543 of the revised charter of the city of New York.

Even if such assistant foreman claims protection from removal without trial under section 21 of the Civil Service Law (as amd.), on the theory that he was

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a member of the volunteer fire department of the city, he must allege that fact in his alternative writ of mandamus seeking reinstatement; otherwise the peremptory writ reinstating him cannot issue.

Such fact is not alleged by including in the writ the letter of the relator's attorney stating that there was no question in his mind but that the relator, being a veteran fireman, was entitled to reinstatement, this being a mere opinion, not an allegation of fact.

A defect in substance in the writ of mandamus may be taken advantage of at any time before the peremptory writ is awarded, and even after the trial of the issue on the alternative writ.

APPEAL by the relator, Lawrence Fogarty, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of February, 1906, denying the relator's motion for a peremptory writ of mandamus after the trial of issues of fact framed by an alternative writ of mandamus and the return thereto.

*William J. Walsh*, for the appellant.

*William B. Crowell* [*Theodore Connolly* with him on the brief] and *William B. Ellison*, *Corporation Counsel*, for the respondent.

CLARKE, J. :

The alternative writ of mandamus allowed on the 5th day of May, 1905, alleged that on or about May 6, 1903, relator was regularly appointed as assistant foreman in the bureau of highways, borough of Queens, at two dollars and fifty cents per day; that he fully performed the duties of said position until November 6, 1903, when he received a written notice signed by the superintendent of highways of said borough which stated, "You are hereby suspended as assistant foreman in this bureau pending the outcome of charges which have been preferred against you;" that he had never been informed of the nature of the charges against him nor has he ever had a hearing thereon or ever had an opportunity to make an explanation; that on or about November 25, 1904, he received a letter from the secretary of the municipal civil service commission which states, "I am in receipt of a communication from the president of the borough of Queens in which he states that your name has been dropped from the rolls for failure to report for duty as an Asst. Foreman." The alternative writ further alleges that relator never has been able to ascertain when his name was dropped from the

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rolls. Set forth in the writ is a letter from relator's attorney dated December 1, 1904, addressed to the respondent which, among other things, states as follows: "There is no question in my mind but that Fogarty being a veteran fireman and being removed without a hearing is entitled to reinstatement."

Upon the writ and the return alleging, among other things, that relator had been dropped from the rolls of the department for failure and neglect to report for duty, a trial before a jury was had of a single question of fact, "was the letter dated November 6th, 1903, suspending \* \* \* the relator, \* \* \* written by \* \* \* (the) superintendent of the department of highways, borough of Queens \* \* \* or was it sent to said relator in accordance with the instructions of said \* \* \* superintendent," the jury found that said superintendent did write said letter and that the said letter was sent to the relator in accordance with the instructions of said superintendent.

Thereupon a motion was made for the issuance of a peremptory writ of mandamus, which motion having been denied, the relator appeals.

We think that the alternative writ was deficient in substance, and that, therefore, the denial of the peremptory writ was required. In *Commercial Bank of Albany v. Canal Commissioners* (10 Wend. 26) Chancellor WALWORTH, referring to the writ of mandamus, said: "All the authorities, both before and since that decision,\* show that any defect in substance in the writ, as a want of sufficient title in the relator to the relief sought, may be taken advantage of at any time before the peremptory mandamus is awarded." In *People ex rel. Dunkirk, etc., R. R. Co. v. Batchellor* (53 N. Y. 128) Judge GROVER, after citing the rule stated in the *Commercial Bank Case* (*supra*), said: "If the law gave an absolute right to the writ where a verdict was found for the relator, although from the entire record it appeared he had no such right, great injustice might be the result." The same rule was applied in *People ex rel. Ryan v. Green* (58 N. Y. 295).

Section 1543 of the revised charter (Laws of 1901, chap. 466) provides that the heads of all departments and all borough presidents, except as otherwise specially provided, shall have power to

\* *King v. Mayor of York* (5 Durn. & E. 74). — [REP,

remove all clerks, officers, employees and subordinates in their respective departments except as herein otherwise specially provided. It was therein especially provided that no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, should be removed until he had been allowed an opportunity of making an explanation.

The relator does not come within said exception because he was neither a regular clerk nor the head of a bureau nor a person holding a position in the classified municipal civil service subject to competitive examination, and there is no allegation in the papers suggesting any such claim. It was, however, "otherwise specially provided" in chapter 270 of the Laws of 1902 amending chapter 370 of the Laws of 1899, as follows: "§ 21. Power of removal limited.— \* \* \* No person holding a position by appointment or employment \* \* \* in the several cities \* \* \* who shall have served the term required by law in the volunteer fire department of any city, town or village in the State, or who shall have been a member thereof at the time of disbandment of such volunteer fire department, shall be removed from such position or employment, except for incompetency or misconduct shown after a hearing upon due notice, upon stated charges and with the right to such employee or appointee to a review by a writ of certiorari."

It is apparent that under that provision of the law it must affirmatively appear in the alternative writ that the relator had served the term required by law in such volunteer fire department or that he was a member of such volunteer fire department when the same was disbanded. The alternative writ contains no such affirmative statement of facts. There is the bare statement in a letter of his attorney that there is no question in the mind of said attorney but that the relator "being a veteran fireman and being removed without a hearing is entitled to reinstatement." This is not an allegation of fact, but a statement of opinion.

In *People ex rel. O'Brien v. Porter* (90 Hun, 401) Mr. Justice PARKER, writing the opinion of the General Term in this department, in which Mr. Presiding Justice VAN BRUNT and Mr. Justice FOLLETT concurred, said: "The relator's petition does not show



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that he served five years in the volunteer fire department or that he was a member thereof at the time of the disbandment of the department of which he was a member. All that it contains on the subject is that the relator says, 'I served as a fireman in the Volunteer Fire Department in the city of New York and received my discharge therefrom on the 2nd day of June, 1862.' Whether it was an honorable discharge or not the petition does not disclose, and it cannot be inferred from the language employed that the relator served the time required by law or that he continued to be a member until the disbandment of the volunteer department of which he says he was a member. It must be held, therefore, that the relator has failed to show in his petition that he was entitled to the protection of the statute which he invokes in this proceeding."

In order to avoid the effect of the general power of removal conferred by the provisions of section 1543 of the revised charter (*supra*) the relator was required to set forth the facts bringing him within the exception. This he has failed to do.

The order denying the motion for the issuance of the peremptory writ should, therefore, be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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PRINCE LINE, LTD., Respondent, v. THE JOHN C. SEAGER COMPANY, Appellant, Impleaded with CORN EXCHANGE BANK, Defendant.

First Department, April 5, 1907.

**Practice—main issues in suit in equity determined by court before reference ordered.**

In an action in equity by a principal against his agent for an accounting when there is an issue as to the basis of the agent's compensation, the trial of the main issue should be had before the court before the case is sent to a referee. If on such trial it appear that an accounting is necessary, the reference should be provided for in the interlocutory decree.

APPEAL by the defendant, The John C. Seager Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of September, 1906, referring the issues herein to a referee.

*Lorenzo Ullo* of counsel [*Ullo, Ruebsamen & Yuzzolino*, attorneys], for the appellants.

*J. Parker Kirlin* [*John M. Woolsey* and *Orville C. Sanborn* with him on the brief], for the respondent.

CLARKE, J.:

This is an action in equity to adjudge that certain funds on deposit with the defendant bank in the name of and to the credit of the defendant John C. Seager Company be adjudged and determined to be the funds of plaintiff and to compel an accounting by the defendant company of the moneys received or collected by it in its capacity as agent for the plaintiff.

From an examination of the papers in the case it appears that the real controversy between the plaintiff and the defendant company, its admitted agent, is as to the basis of the commissions to which the defendant is entitled under its agreement of agency. The fiduciary relation is admitted, the obligation to account is admitted and a balance due and owing to the plaintiff is admitted by the defendant to be in its hands or under its control. The terms of the agreement being once established, and the basis upon which commissions are to be allowed being ascertained, it is quite possible that there will be no necessity for an accounting. Under such circumstances it is the rule in equitable actions that a trial of the main issue should first be had before the court, and this issue being disposed of, and it then appearing that an accounting is necessary, it may be provided for in the interlocutory decree.

The order appealed from should, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs,

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ABRAM WYCKOFF, Respondent, v. ALBERT L. WOARMS and LOUIS J. LESSER, Appellants.

First Department, April 5, 1907.

**Arbitration — when agreement to arbitrate not void — contract — waiver of conditions of contract in consideration of agreement to arbitrate — party withdrawing from arbitration cannot take advantage of waiver.**

An agreement in a building contract that an arbitrator shall determine whether work is added or omitted under the contract and the value of such work, without any general agreement for the adjustment of controversies, does not oust the court of jurisdiction nor is it void as against public policy.

When a building contract provides that there are to be no extras unless by agreement of parties or upon written authorization and that stipulation is waived by one party on condition that the other agree to submit certain controversies to arbitration, and the latter party withdraws from the arbitration without cause, he cannot thereafter recover for extras not furnished on written order. He cannot have the advantage of a waiver of a provision of the contract without complying with the conditions of the contract as modified.

PATTERSON, P. J., and HOUGHTON, J., dissented in part.

APPEAL by the defendants, Albert L. Woarms and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 21st day of February, 1906, upon the report of a referee.

*Frederick Hulse*, for the appellants.

*Franklin Nevius*, for the respondent.

LAMBERT, J. :

John W. Ferguson had a contract for the construction of a building for the Hamilton Trust Company of Paterson, N. J. Plans for the same were made by one H. G. Stephens, architect. The firm of D. S. Hess & Co., these defendants, were sub-contractors under Ferguson. The plaintiff, doing business as the Empire Brass and Metal Works, entered into a contract with the defendants on July 31, 1902, for the performance of certain work and the furnishing of certain materials in the construction of the metal work of iron, polished and electroplated, for the said Hamilton Trust Company's building. By the terms of the original contract this work was to

have been completed on the 25th day of October, 1902. This provision was waived by mutual consent November 11, 1902, and the contract was modified by making a change in the materials to be used at an additional cost to the defendants of \$3,000, which brought the contract up to \$10,750. This modified contract fixed no date for the completion of the work.

The original contract, after stipulating that the sub-contractor (the plaintiff) should "well and sufficiently perform and finish in a thoroughly workmanlike manner \* \* \* all metal work of iron," etc., "under the direction and to the satisfaction of the general contractors (these defendants) and H. G. Stephens, architect, \* \* \* agreeably to the drawings and specifications made by the said architect," provided in the 3d clause that "should any alteration be required in the work shown or described by the drawings or specifications, a fair and reasonable valuation of the work added or omitted shall be made by the general contractors, and the sum herein agreed to be paid for the work according to the original specifications shall be increased or diminished as the case may be." It was further provided that "in case such valuation is not agreed to, the sub-contractor shall proceed with the alteration upon the written order of the general contractors, and the valuation of the work added or omitted shall be referred to three (3) arbitrators, \* \* \* the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference."

It is clear that under the provisions of this clause the plaintiff could do no extra work for which he could make a charge except upon the written directions of the defendants. In case the defendants gave such directions and the extra work was done, then if the parties could not agree upon the reasonable value of the same the arbitrators were to fix the same, and their decision should be binding. The arbitrators are not given any authority to determine the question of what was "work added or omitted." That was left to the parties themselves. The only question which could be submitted to arbitration under the 3d clause of the contract was the valuation of the work added or omitted. This appears to be the construction placed upon the contract by the parties. Disputes at once arose as to whether or not certain work required by the

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defendants was within the requirements of the contract, the defendants insisting it was, and the plaintiff disputing it and demanding written instructions as a basis for a claim for extra work. The result was that the work was delayed until Mr. Ferguson, the original general contractor, demanded to know of the plaintiff why the work was not progressing. He was informed of the state of disputation of the parties. He suggested that all matters in dispute be submitted to him for arbitration. As a result February 25, 1903, the plaintiff wrote the defendant, saying: "It is perfectly agreeable to us to leave all questions as to the interpretation of the plans and specifications to Mr. John W. Ferguson for his decision. This refers only to matters which have not been decided up to that date. It is also agreed that Mr. Ferguson's decision shall be final. If this is your understanding of the matter kindly send us your acceptance of same, and we will proceed with all drawings or instructions which are given us in writing affecting the work on the Hamilton Trust Company in Paterson, N. J., without raising any question, no matter whether it is according to contract or not."

On the twenty-seventh day of February, two days later, the defendants wrote to the plaintiff: "We are agreeable to leaving undecided questions in relation to the above work to the decision of Mr. John W. Ferguson, but do not desire that work be proceeded with upon this building which might be construed as additional work without a written notice to that effect from you." On the twenty-eighth day of February the plaintiff acquiesced in the suggestion that the extra work for which a claim was to be made should be stated in writing to the defendants, at the same time enumerating the items for which he would ask Mr. Ferguson to award "an extra," which embraced "the iron work which goes above the frames which we made for the revolving doors, \* \* \* register facings," and "the trouble and expense we have been put to, owing to the fault of some one in setting those revolving windows, without authority from us." It was declared in this communication that "this covers all the points which have not been settled between ourselves," the defendants being requested if there was any of this work to be stopped to notify the plaintiff at once.

The practical result accomplished here is not a waiver of the

provisions of the 3d clause of the contract, but a modification of the contract, to make it a workable agreement. The parties could not agree as to what constituted the alterations provided for in that clause, and to obviate this difficulty they agreed between themselves that Mr. Ferguson should determine the construction to be placed upon the provisions; he was to determine whether the work was called for under the contract or whether it was extra, and while this under the exact language of the writings is all that is provided for, the parties appear to have acted upon the theory that the arbitration was to extend to a determination of the value of the extra work performed. In other words, the 3d clause of the contract was, by mutual agreement, modified so as to provide that in the event of the parties failing to agree upon the question of whether the work was within the contract and the fair valuation of such work where it was extra, the decision of Mr. Ferguson should be final, provided that the plaintiff should before undertaking any such extra work notify the defendants in writing of his intention of claiming extra for the same. The rights of the parties upon this appeal must, therefore, depend upon what has been done under the contract as modified. After this modification it was no longer necessary that the plaintiff should have a written authorization to do extra work; he was complying with his contract when he went forward with the work as laid out in the plans and specifications, provided he notified the defendants in advance of his intention to claim as extra any work which he construed to be such. The defendants undertook to pay him for such extra work when found to be extra by Mr. Ferguson at a fair valuation, such fair valuation to be likewise determined by the arbitrator agreed upon. The plaintiff's right to recover in this action for extra work must depend, therefore, on whether he has complied with these conditions or established by proof a legal excuse for his failure to do so.

The principal item for extras for which the plaintiff recovered before the referee and upon this appeal seeks to sustain, was set forth in the eighth cause of action of the complaint. After alleging the formalities of performance the complaint continues, "That upon the completion of the contract, as hereinbefore set forth, the plaintiff submitted the question as to the valuation of such additional work to John W. Ferguson. That the said John W. Fergu-

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son refused to pass upon said item without passing upon all items in dispute directly between the plaintiff and the said John W. Ferguson. That the plaintiff notified the defendants of the action of the said Ferguson and that he would not be bound thereby. That thereafter the plaintiff offered to refer to three arbitrators, as provided in said contract, the question of the kind, character and valuation of such additional work. That thereupon the defendants refused to refer to three arbitrators, as provided in said contract, the question of the kind, character and valuation of such additional work." The pleader then alleges reasonable valuation and asks for judgment for the amount. The answer puts these matters in issue.

We examine the record in vain for any evidence to show that John W. Ferguson refused to pass upon the matters submitted to him by the plaintiff, except upon condition that he should pass upon other matters pending between himself and the plaintiff. It is true that the plaintiff in his letter refuses to go on with the arbitration, and alleges that the arbitrator refused to consider matters except in connection with others in which he was interested, but this is not evidence of that fact. It clearly appears from the record that the only matters before Mr. Ferguson were such as the plaintiff voluntarily placed before him. There is no evidence which warrants the conclusion that Mr. Ferguson sought or undertook to pass upon any item or question which plaintiff did not voluntarily place before him. The evidence clearly discloses that the plaintiff knew neither more nor less of Mr. Ferguson at the time of the submission of his questions than he did at the time the contract was modified, and so far as we can discover there was no reason for his withdrawing from the arbitration. If there were good reasons why Mr. Ferguson was not a proper person to act, it was the duty of the plaintiff, under his contract, not to repudiate the arbitration absolutely but to point out the disqualifying circumstances and seek to have a different person chosen. But the plaintiff alleges that he did something of the kind; that he "offered to refer to three arbitrators, as provided in said contract, the question of the kind, character and valuation of such additional work," and that the defendants refused so to refer. It is true that the plaintiff did, November 14, 1903, at the time of repudiating the arbitration under his modified contract, ask the defendants to name their man under the provisions of clause

3 of the original contract, and again, November twenty-third there was a demand to have such arbitrator named by return mail, and unless this demand was complied with by November twenty-fifth, the plaintiff would "assume that you do not care to go on with the arbitration provided for by clause 3 of our agreement, and will at once apply to the courts for proper relief." Replying to this letter, the defendants on the twenty-fifth of November say: "While we do not see any obligation on our part to enter into any arbitration other than we have already agreed to, we are disposed to have the controversy between us settled as speedily and with as little inconvenience as possible to all parties concerned." Then followed a proposition to "arbitrate all the questions between us," provided that the plaintiff would agree "that the decision shall be final and binding and that judgment be entered upon this decision." Thereupon the plaintiff wrote to the defendants that "We do not see any reason for us now to deviate from the terms of the contract between us of July 31st, 1902. That contract was good enough for us then and is good enough for us now. On the basis of the terms of that contract we proceeded with our work and on that basis we stand to day. Clause 3 of that contract is specific, and in pursuance of that clause we request you now, for the last time, to-day, to name us your representative for the arbitration provided for by that clause of our contract." On the third day of December the plaintiff seems to have repented of this and offers to arbitrate as suggested by the defendants, but nothing was ever done about it, and the plaintiff testified that he thought he had indicated that he would not act under this last letter. If we assume that the plaintiff had a right to repudiate this arbitration before Mr. Ferguson, and that the result of this repudiation would be to restore the original contract, it must be apparent that the offer of arbitration made by the plaintiff was not that provided for in clause 3 of such contract. That clause provided merely for arbitrators to determine the reasonable value of the work added or omitted, and not the determination of whether or not there was added or omitted work; that was to be evidenced by the written authority of the defendants. The plaintiff's theory seems to be that he could have a modification of the contract, waiving the written authorization by the defendants, and at the same time have the benefit of the provisions for arbitrators to



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determine the valuation of the work which he claimed was extra. But this clearly never was within the contemplation of the parties and it never became any part of the contract between them. The defendants in their original work, in the event of a disagreement, stipulated that upon their written order plaintiff might do the work which should be regarded as extra, and that the valuation of such work should be fixed by the arbitrators. There was no provision for any general arbitration, merely the value of the work which had been added or omitted from the drawings and specifications, which became a part of the contract, and the plaintiff could not recover under this contract for extra work except by showing that it had been authorized in writing. The plaintiff could not enlarge this provision of the original contract by a modification of it, and then arbitrarily repudiate the results of such modification. He cannot "blow hot and cold" at the same time. He must stand upon his original contract and show compliance with its terms and conditions, or he must stand by his modified agreement and show that he has performed under that. There is no pretense that the plaintiff has the written authorization for most of the extra work for which he is now claiming. It is clear that he is not permitted to recover for extras under his original contract without producing written authority of the defendants to proceed with the work. There is no claim, and there cannot be, under the evidence in the case, that he had or has such written authority. It is equally clear that he could not have the advantage of a waiver of any of these provisions without complying with the conditions of the modified contract. He was relieved of the burden of securing a determination whether the work was within the contract, or of having a written authorization for such work, upon the condition that he would submit the question of the construction of the contract, and of the reasonable value of the work added or omitted, to Mr. Ferguson, and having refused, without fault on the part of the defendants, to submit to such arbitration as he had agreed upon as a condition of the modification of the original contract, he is not entitled to recover for such extras. The suggestion that the defendants lost any rights by failing to protest when the plaintiff notified them that he refused to be bound by the arbitration of Mr. Ferguson is begging the question. They had agreed to submit to this arbitra-

tion; they had modified their contract in this respect; they had done no wrong; their liability depended upon the plaintiff securing the award of the arbitrator, and if he chose to repudiate the contract it was no part of their duty to protest against it. But, as a matter of fact, they did offer to submit the whole question to three arbitrators, conditioned only that judgment might be entered upon the decision, and this the plaintiff refused, preferring to stand, as he said, upon the terms of the original contract. It now appears that with those terms he did not comply. There is no reason to suppose that the defendants would not, if they had known of any misconduct on the part of Mr. Ferguson, have agreed to the substitution of some other person, if such suggestion had been made to them by the plaintiff; and as the duty and obligation of satisfying conditions precedent was upon the plaintiff, and he made no effort to comply with the letter or spirit of his modified contract, but asserted his right to go back to the original contract, he has only himself to blame if he is denied the benefits of the judgment in his favor, in so far as it relates to the eighth cause of action. The record shows conclusively that he has neither complied with the conditions of the original contract nor with those of the contract as modified by the Ferguson arbitration provision. It is equally clear that the evidence fails to disclose any misconduct on the part of the arbitrator, or any disposition on the part of the defendants to prevent a just and equitable adjustment of the questions in the manner pointed out by the contract. On the contrary, the defendants appear to have been willing to continue the arbitration as agreed upon, or to submit the questions in dispute to the arbitration board, provided only that judgment might be entered upon its decision.

In this situation it is by the plaintiff suggested, on the authority of *Seward v. City of Rochester* (109 N. Y. 164), that the determination of Mr. Ferguson as arbitrator was not a necessary condition precedent to the right of the plaintiff to recover. The proposition is that the agreement to arbitrate was such as to oust the courts of jurisdiction, and that it was void as against public policy. There can be no doubt of the rule that where parties undertake, by independent covenant or agreement, to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts, such agreement is void and does not stand

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in the way of recovery. The case cited is authority for that proposition. In the case at bar, however, there is no general agreement for the adjustment of controversies; there is a mere provision that the arbitrator shall determine whether work is added or omitted under the contract and the value of such work. When these questions have been determined the courts have full authority to adjust the rights of the parties, and, under such circumstances, the jurisdiction of this State will be searched in vain, we believe, for a case holding that such an agreement is void. In the *Seward Case* (*supra*) the plaintiff entered into a written agreement with the water commissioners of the city of Rochester granting to them the right to lay iron pipes for the conveyance of water across his land, with the right to enter upon same for the purpose of making repairs. The city covenanted to pay him "a fair and just compensation for any damages" that might accrue "by the breaking, bursting or leakage of said water pipes, or any of them, or from any other cause." It was then agreed as far as these possible and prospective damages were concerned, that if the parties could not agree upon the amount, the damages should "be appraised and fixed by two disinterested persons, one to be selected by each party, and in case they cannot agree, by an umpire to be selected by them, and the award of two of the three thus selected," it was declared, should be "final and conclusive." The discussion of the learned court points out clearly the objections to this clause; that it is a general provision not confined to the rights created by the contract, but covering all possible injuries flowing from the construction and maintenance of the pipes of every kind and class, and quotes with approval the discussion of the court in *President, etc., D. & H. Canal Co. v. Penn. Coal Co.* (50 N. Y. 250) as follows: "In one class it is said 'the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts; and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue certain facts shall be determined or amounts or value ascertained, and this is made a condition precedent, either in terms or by necessary implication.' \* \* \* The agreement here belongs in the first class.

It submits all controversies which may arise in the future out of the grant made to arbitration and totally irrespective of the question whether the rights sought to be vindicated shall prove to be the creation of the contract or have an independent existence under the law as administered by the courts," etc. The case at bar as clearly falls within the second class as the *Seward Case* (*supra*) fell within the first class. Here the only questions agreed to be submitted arise directly under the contract. The first is whether there is work added or omitted, as appears from the drawings and specifications; and the second is the reasonable valuation of such work added or omitted. The determination of these questions is clearly a condition precedent to any right of recovery on the part of the plaintiff under the modified contract, and the conditions named in the 3d clause are of a like nature if the plaintiff elects to stand upon his original contract. In the case of *Sweet v. Morrison* (116 N. Y. 19) the agreement was far more general and inclusive in its character, and the court not only approved the contract but held that the award of the engineer, who was the arbitrator, could not be corrected upon the trial although error might be shown. (See *O'Brien v. Mayor, etc., of N. Y.*, 139 N. Y. 543; *Byron v. Low*, 109 id. 291; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242.)

In the case last above cited the court reiterates the rule that "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." (See, also, *Spink v. Co-operative Fire Ins. Co.*, 25 App. Div. 484.)

The provision under consideration in *National Contracting Co. v. Hudson River W. P. Co.* (170 N. Y. 439) was certainly far more open to the objection that it tended to oust the courts of jurisdiction than the contract here under consideration, yet the court on demurrer refused to sustain the contention that it was void; and we believe the uniform authority of this country is in harmony with the views expressed.

If we are correct in these conclusions it follows that the eighth cause of action must fail. The plaintiff fails to show an award on

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the part of the arbitrator agreed upon, or any justification in law for a failure to produce such evidence, and the written notice of claim by the plaintiff does not meet the requirements of the 3d clause of the original agreement that the work should be undertaken only upon the written authorization of the defendants. The Court of Appeals in *Langley v. Rouss* (185 N. Y. 201) has recently laid down the wholesome doctrine that "a provision that the builder is not to execute any extra work or make any modifications or alterations in the work mentioned in the specifications and plans unless ordered in writing by the engineer in charge, or claim payment for the same unless such written order be produced, is valid and should be enforced." In the case at bar there were to be no extras unless by agreement between the parties, or upon the written authorization of the defendants, subject to an arbitration as to the value of the work, and this court is not at liberty to permit a recovery where the conditions mutually agreed upon have not been complied with.

We are equally clear that there is no valid foundation for the cause of action No. 7. There was no time limit in the modified contract. No notice was given at any time by the plaintiff that he would hold the defendants responsible for damages resulting from delay because of their failure to perform. This was prerequisite to a right of recovery for damages resulting from such a cause as is here claimed. In fact the record does not disclose that the defendants were in default under the contract at any time, and that they are liable for delays such as are shown by the record.

The findings of the referee in respect to causes of action numbers 1, 2, 3, 4, 5 and 6 may be said to be supported (though meagre in instances) in the testimony, and the judgment to that extent should not be disturbed.

The judgment should, therefore, be modified by deducting \$3,569.04 therefrom as of the date of entry, and as so modified affirmed, without costs.

INGRAHAM and LAUGHLIN, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., dissented in part.

PATTERSON, P. J. (dissenting in part):

I concur in the reduction of the judgment recovered in this action by the sum of \$576, which the referee has allowed for damage suf-

ferred by the plaintiff on account of extra superintendence of work, which it is asserted was required in consequence of delay in the work caused by acts of the defendants. I am of the opinion that the evidence did not justify the referee in allowing that amount as an item of recovery by the plaintiff.

I am compelled, however, to dissent from the further reduction of the judgment by the sum of \$2,993.04, which amount was allowed by the referee for extra work as claimed by the plaintiff. While it is true that by the terms of the contract between the parties written orders were required to authorize the performance of extra work, yet the evidence shows satisfactorily to my mind that such requirement was waived. That the work was performed and that the defendants received and accepted it is indisputable. During its progress the defendants agreed to submit the construction of the contract to arbitration. Pending that arbitration it was disclosed that Mr. Ferguson, one of the arbitrators, was personally interested in the determination of the question, for this work was evidently such as would either come within a contract to be performed by him or within the plaintiff's contract, and the latter, with good reason, objected to going on with the proceeding before one who was virtually an adverse party to him. It was not incumbent upon the plaintiff, after refusing to proceed before a board of arbitrators of which Ferguson was a member, to suggest a new arbitrator. While it appears that efforts were made to constitute another board of arbitration, which efforts failed, there was no absolute legal obligation on the plaintiff's part to submit his claim to another arbitrator or other arbitrators. The referee has found, and upon abundant evidence, that the whole amount of \$2,993.04 was actually for extra work, and I am of the opinion that the plaintiff is justly entitled to recover that amount.

The judgment should be modified by deducting therefrom the amount of \$576, and as thus modified affirmed, without costs in this court.

HOUGHTON, J., concurred.

Judgment modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

WEBB'S ACADEMY AND HOME FOR SHIPBUILDERS, Respondent, v. THOMAS B. HIDDEN, Individually and as Trustee under the Last Will and Testament of HENRIETTA A. WEBB, Deceased, and Others, Appellants, Impleaded with BROWNING, KING & COMPANY, Defendant.

First Department, April 5, 1907.

**Trust — conveyances and contract not creating trust for benefit of third person — contract to convey lands at future date, when subject to revocation.**

The owner of lands and his wife conveyed to a third person, who in turn reconveyed a life estate to the original grantor with an absolute fee to his wife if she survived her husband, and if not, then to a benevolent corporation. Upon the same day the grantor's wife entered into a contract with her husband which recited the conveyances aforesaid and whereby she agreed to leave the lands by will or deed to the corporation to take effect upon her death. The deeds were recorded, but both they and the contract were made without any knowledge or privity on the part of the corporation and without any consideration moving from it. Subsequently the original owner and his wife abrogated the agreement, and entered into a new contract to transfer the property to their son.

On the issue as to whether said instruments were effective to vest a title in the corporation,

*Held*, that the corporation not being a party to the contract between the owner and his wife and parting with no consideration, was not entitled to enforce it; That the corporation's interest under the deeds was contingent upon the wife dying before her husband and that as she survived him, she took the fee; That no irrevocable trust was created for the benefit of the corporation which required the wife to convey, and that the contract being wholly executory during the lifetime of the husband and being based upon no consideration furnished by the corporation, could be rescinded so as to revoke the trust, if any.

INGRAHAM, J., concurred, with opinion.

APPEAL by the defendants, Thomas B. Hidden, individually and as trustee, etc., and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 27th day of January, 1906, upon the report of a referee.

*Charles F. Brown and George S. Hamlin*, for the appellants Thomas B. Hidden and others.

*Frederick P. Bellamy*, for the appellants William E. Webb and H. Ada Webb.

*John G. Milburn and Walter F. Taylor*, for the respondent.

LAMBERT, J. :

William H. Webb, in his lifetime and in the year 1889, caused to be established Webb's Academy and Home for Shipbuilders. It was incorporated under the laws of New York, and since its creation has been supported through the generosity of the founder. This corporation is the plaintiff. William E. Webb, defendant, is the only surviving son of William H. Webb, and H. Ada Webb is his wife. On the 26th day of September, 1889, William H. Webb voluntarily gave to the plaintiff by deeds absolute, subject only to a life estate in himself, certain real estate of the approximate value of \$2,000,000, which property passed into plaintiff's possession and full enjoyment upon the death of its benefactor, and has since that time paid an annual income of over \$87,000. On the same day Mr. Webb and his wife joined in a deed of the premises involved in this action to one Thomas B. Hidden, and the latter, likewise on the same date, made and delivered a deed of the said premises, the habendum clause of which is as follows: "To have and to hold all and singular, the above granted premises together with the appurtenances and every part and parcel thereof, unto the said William H. Webb and his assigns for and during the natural life of said William H. Webb, and upon and after his death unto the said Henrietta A. Webb, her heirs and assigns forever, if she then be living; but if the said Henrietta A. Webb shall not survive the said William H. Webb, then upon and after the death of said William H. Webb, unto the said Webb's Academy and Home for Shipbuilders, its successors and assigns forever, subject as aforesaid." Mr. Webb and his wife thus joined in conveying to Mr. Hidden property which was owned in fee by Mr. Webb, subject to the dower rights of his wife, and he, Hidden, conveyed a life estate to Mr. Webb, with an absolute fee to Mrs. Webb if she survived her husband, otherwise to Webb's Academy. The said Webb's Academy is recited as one of the parties of the second part, but it in fact had no relation to the deed, except that in the event of Mr. Webb surviving his wife, it was to become the owner of the fee. This deed, as well as



the one upon which it was based, was recorded. Resulting from this situation, it must be assumed that at this time the academy had no interest in the transaction, except in the event of Mrs. Webb dying before her husband. It furnished no part of the consideration and its interest was entirely contingent upon the life of Mrs. Webb, who, in fact, survived her husband, and thus the record title became vested in her.

Upon the same day, and probably as a part of a general scheme of providing for the academy, Mr. and Mrs. Webb made and executed a contract, which was delivered to Mr. Webb in which it was recited that "Whereas, the party of the second part (Mr. Webb) now, previous to and until the conveyance thereof hereinafter mentioned, the owner, subject to a mortgage for Eighty thousand dollars and interest of the following described premises" (referring to the premises in suit), "And whereas the party of the second part has this day pursuant to an agreement with the party of the first part, and subject to said mortgage for Eighty thousand dollars, conveyed the said premises to Thomas B. Hidden, and has secured the said Thomas B. Hidden to convey the same as follows: to wit, to the party of the second part for and during his natural life, and upon his death to the party of the first part, her heirs and assigns, if she be then living, but if the party of the first part should not survive the party of the second part, then upon the death of the party of the second part, to Webb's Academy and Home for Shipbuilders," etc.; and "Whereas it is a part of the agreement and the consideration upon which said conveyances have been made, that if the party of the first part shall survive the party of the second part, and the title to said premises become vested in her pursuant to said conveyances, she will forthwith perform all acts and execute all instruments, which shall be requisite and proper, in order to vest in said Webb's Academy and Home for Shipbuilders, the fee simple of said premises upon her death and subject to an estate in her for her own life, and also subject to said mortgage for Eighty thousand dollars, \* \* \* and otherwise free and clear from any incumbrances thereon, \* \* \* and to that end will either by a proper will duly executed devise the said premises in fee to said Webb's Academy and Home for Shipbuilders, or by a proper deed duly executed and acknowledged convey to said Webb's Academy and Home for Ship-

builders a remainder in fee in said premises, to take effect upon her death; Now, therefore, in consideration of the premises and of the sum of one dollar, \* \* \* the party of the first part does, for herself, her heirs, executors and administrators, covenant and agree to and with said party of the second part, his heirs, executors, administrators and assigns, and to and with the said Webb's Academy and Home for Shipbuilders, its successors and assigns, that in case she shall survive the party of the second part and the title to said above described premises shall become vested in her pursuant to said conveyances, she will forthwith do and perform all acts and things, and execute, acknowledge and deliver all instruments which shall be requisite and proper in order to vest in said Webb's Academy and Home for Shipbuilders, the fee simple to said premises after her death, and subject to an estate in her for and during her natural life, and subject also to said mortgage for Eighty thousand dollars, \* \* \* and for that purpose will either by last will and testament, duly executed and containing apt and effectual provisions, devise the said premises to said Webb's Academy and Home for Shipbuilders, its successors and assigns, or by deed duly executed, and containing apt and effectual provisions, convey to said Webb's Academy and Home for Shipbuilders a remainder in fee in said premises to take effect upon and after her death." Mrs. Webb likewise covenanted and agreed for herself, her heirs, executors, administrators and assigns, with Mr. Webb, "that the above covenant and agreement is made to and with and shall enure to the benefit of the said Webb's Academy and Home for Shipbuilders," etc.

The deeds referred to were duly recorded, and the contract mentioned remained in the possession of Mr. Webb, without any knowledge or privity on the part of the plaintiff, for the period of about ten years. Before Mrs. Webb came into the possession of the premises under the deeds and contract mentioned, and on the 3d day of October, 1899, Mr. and Mrs. Webb entered into a new agreement, in which the provisions of the previous contract were recited and by mutual agreement abrogated, and it was then agreed that the property should be transferred to the son of the parties in substantially the same language as was employed in the original contract in providing for its transfer to the plaintiff. William H.

Webb died about October 30, 1899. Before her death and the commencement of this action the son, William E. Webb, conveyed all his right in the premises to his mother, Henrietta A. Webb, and her estate is represented in this action by the defendant Hidden as trustee. The learned referee before whom this case was tried reached the conclusion that through and by the deeds and contract of September 26, 1889, an irrevocable trust resulted in behalf of the plaintiff, and that it was entitled to the premises, as well as the sum of \$99,905.11 accrued interest and profits. The defendants have severally appealed from this judgment entered upon the report of the referee.

It was conceded upon the argument, and is manifest, that the plaintiff has no standing in court to sue upon the contract between Mr. and Mrs. Webb, there being no obligation on the part of either of them to the plaintiff. It is a stranger to the contract, its consideration and obligations. (*Lawrence v. Fox*, 20 N. Y. 268, and kindred cases.) The judgment must be sustained, if at all, upon the theory that by the instruments of September 26, 1889, Mr. Webb by a voluntary act unknown to the plaintiff, to which he owed no legal duty, established an irrevocable trust in its favor.

It is not contended that a valid express trust under the statutes of New York was created, but that the conveyance to Henrietta A. Webb, in consideration of and conformity with the covenants on her part contained in the contemporaneous agreement, established a trust relation between the grantee Henrietta A. Webb and the plaintiff as beneficiary of the trust, and the effect of the New York statutes relating to uses and trusts is conceded to be immaterial. The proposition of the learned counsel for the respondent is that William H. Webb, being the absolute owner of the estate, made a complete conveyance thereof to Mrs. Webb in consideration of her promise and covenant that the academy should have the remainder after her death, and that there being complete conveyance of the property by the owner in consideration of the promise of the grantee to convey an estate therein to a third person, the conveyance is in legal effect, so far as concerns such third person, a conveyance in trust, and there was an immediate vesting of the estate not to be changed by any subsequent agreement between Mr. and Mrs. Webb.

The fundamental question involved in the present controversy relates to the establishment of an irrevocable trust duty imposed upon Mrs. Webb to convey, and we are of the opinion that such trust relationship does not exist. To constitute a trust there must be either an explicit declaration of trust or circumstances which clearly disclose that a trust was intended to be created. If an irrevocable trust which passed title at that time to Webb's Academy was not created the plaintiff's case necessarily fails because a new agreement respecting the property could be made. "It would," says the court in *Beaver v. Beaver* (117 N. Y. 421), "introduce a dangerous instability of titles, if anything less was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention." (*Young v. Young*, 80 N. Y. 438.) The terms of the conveyances and contract do not in express language vest the title to the premises in the plaintiff. The learned referee concluded that the contract, inclusive of the deeds, was not an executory contract and within recall by the parties; that an estate was vested in Mrs. Webb burdened with a trust obligation which carried an immediate vested right in the plaintiff. Such a consequence was found to be the intention of the parties.

In this conclusion we are unable to agree. Mr. and Mrs. Webb owed no legal or moral duty to the plaintiff, based upon any legal or equitable consideration. The only possible right of the plaintiff to the property in question depends upon the voluntary act of both Mr. and Mrs. Webb. She merged her right of dower in the conveyance to Hidden at the time the latter made the deed to her; and the question is: Was it the intention of these two persons, all the covenants being upon the part of Mrs. Webb, to establish an irrevocable trust? If it was, why did they not reserve a life estate for themselves and cause the transfer of the property directly to the academy? This was done in the case of the other property conveyed at the same time. It would have been certain of producing the desired result, if the intention was in fact to make an irrevocable disposition of the property. The practical interpretation of an agreement by the parties to it is always a consideration of great weight in ascertaining what the parties intended. (*Insurance*

*Co. v. Dutcher*, 95 U. S. 273; *Sattler v. Hallock*, 160 N. Y. 291.) For a period of upwards of ten years Mr. Webb, during all that time the president and sole supporter of the plaintiff, never told any member of the board of directors or officers of the plaintiff of the existence of this contract through which it now seeks to maintain title to the premises in question. This fact alone, to my mind, is inconsistent with an intention to create an estate for the benefit of the plaintiff. Again, after the expiration of ten years and while Mr. Webb was in the possession of his life estate, he and his wife, acting in good faith and within their legal rights, as they interpreted the contract, annulled it and substituted therefor a new contract which gave the property to their son. They assumed that the contract in question was an executory contract and revocable at any time before execution. It is hard to conceive that these people entered into this contract between themselves, keeping it secret from the plaintiff and finally concurring in a contract of annulment, if they, in September, 1889, understood that they were creating an irrevocable trust in favor of the plaintiff. The deed gave the fee of the premises to Mrs. Webb if she survived her husband. If she predeceased her husband, then it was to go to the plaintiff. The contract merely provided for the transfer of the premises to the plaintiff, upon the death of Mrs. Webb, provided she came into ownership under the deed. The contract must, therefore, have been understood to have been executory during the entire lifetime of Mr. Webb, and as there was no obligation on the part of either of them to give the property to the plaintiff to the exclusion of their son, and the plaintiff not having changed its position in anticipation of coming into possession of the property, there is no reason why a court of equity should be astute to discover an intention where none is expressed, and where the facts and circumstances do not reasonably, if not irresistibly, lead to the disclosed intention to create a trust which should be irrevocable. It seems to us that the fair and reasonable construction of the conduct of the parties is that after the deed was made and delivered they agreed as to what they mutually desired to be done with the property in the event provided for in the contract, and that, as between themselves, they stipulated and agreed that this disposition should be made in the event that Mrs. Webb survived

her husband, and if this event had happened while the contract was yet in force, it is not to be doubted that Mrs. Webb would have complied with its conditions. But before the contract could have any force or effect, and before its contents were known to the plaintiff, the parties thereto, in harmony with their natural right, executed a new contract upon a sufficient consideration and annulled the pre-existing one. If this does not negative the idea that the parties intended an irrevocable trust, it certainly makes that view as definite and certain as the contrary one, and the rule in such cases prevents the court from holding that a trust has been created.

It is argued by the appellant that this case, in principle, is analogous to those cases in which persons have made deposits in savings banks in trust for third parties, the depositors retaining the evidences of the deposits and making no mention of the same to the persons in whose behalf the trusts are nominally made, and where the courts have held that if the depositors die without revoking the trust, the money is vested in the persons named as beneficiaries, but that during the lifetime of the depositors the beneficiaries have no rights, and the depositors have the power to revoke the trust. In *Matter of Totten* (179 N. Y. 112) the court reviewed the decisions upon this line of cases and laid down the proposition that "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." The argument is not without force and the principle would seem to apply here. Although there may be no such thing as a tentative trust of real estate, yet there was an obligation binding upon the conscience of Mrs. Webb if she came into the possession of the estate while the contract was in existence to execute the same. That event did not happen. While Mr. and Mrs. Webb were alive, and while the fee of the premises in question and all rights thereunder were vested in them, they had a clear

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right as against the plaintiff in this action to revoke the trust, and to dispose of the property as they might mutually agree, for the determinant fact remains that there never was a delivery of any deed or conveyance passing title to or for the benefit of the plaintiff.

It does not seem necessary to discuss the suggestion that there may have been a power in trust, for if the parties had a right to revoke their contract, and we reach the conclusion that they had and did, there was no more foundation for a power in trust than there was for an irrevocable trust.

The judgment appealed from should be reversed, and a new trial ordered before another referee, with costs to appellants to abide event.

PATTERSON, P. J., LAUGHLIN and HOUGHTON, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the reversal of this judgment. William H. Webb was the owner of the property in question, subject to an inchoate right of dower of his wife. Mr. and Mrs. Webb made an agreement between themselves as to the disposition of this property, which was evidenced by three instruments executed simultaneously and which, I think, in ascertaining the intent of the parties and the rights acquired must be read together. The first instrument was a deed conveying the property to Thomas B. Hidden, executed by both husband and wife. The second instrument was a deed from Thomas B. Hidden, party of the first part, William H. Webb, Henrietta A. Webb (his wife) and Webb's Academy and Home for Shipbuilders, parties of the second part. By this deed the property was conveyed to William H. Webb during his natural life, and upon and after his death unto Henrietta A. Webb, her heirs and assigns forever, if she then be living, and if the said Henrietta A. Webb should not survive the said William H. Webb, then upon and after the death of William H. Webb unto the said Webb's Academy and Home for Shipbuilders, its successors and assigns forever. These two instruments were executed, delivered and recorded, and thereby William H. Webb acquired an estate for life in the property, with a vested remainder to Mrs. Webb in fee, with a contingent remainder over to the plaintiff in the event that Mrs. Webb did not survive her husband. The parties had also agreed as

between themselves what disposition Mrs. Webb should make of the property in case she survived her husband and acquired the fee, and that was evidenced by the third instrument in which Henrietta A. Webb (wife of William H. Webb) was party of the first part and William H. Webb was the party of the second part. By the instrument the party of the first part (Mrs. Webb) agreed to execute a conveyance or will so as to vest the plaintiff with the remainder in the property after her death, and she further covenanted and agreed that this covenant and agreement "is made to and with and shall enure to the benefit of the said Webb's Academy and Home for Shipbuilders, its successors and assigns, as well as to and with the party of the second part, his heirs, executors and administrators, and that the said Webb's Academy and Home for Shipbuilders, its successors and assigns, shall be entitled to enforce the same against the party of the first part, her heirs, executors, administrators and assigns as well in equity as at law and by suit for specific performance as well as by action for damages, and that in case the party of the first part shall fail in her lifetime, either by conveyance or by last will and testament to vest in said Webb's Academy and Home for Shipbuilders, the fee simple of said premises to take effect upon and after her death, then the said Webb's Academy and Home for Shipbuilders shall nevertheless be entitled to the ownership and possession of said premises and to all remedies against and releases, conveyances, and acquittances by the heirs, executors, administrators and assigns of the party of the first part, which shall be requisite and proper to vest in and to itself and its successors the title to said premises in fee simple." This instrument was executed and acknowledged and was in possession of William H. Webb until he delivered it to his counsel at or about the time of its revocation as hereinafter stated.

Taking this transaction as a whole, and these several instruments designed to carry out the agreement between William H. Webb and his wife as to the disposition of his property together, I think if there had been a delivery of this agreement, or if there had been any consideration proceeding from the plaintiff, the court would have implied a trust under which Mrs. Webb held the property in trust for the plaintiff, but William H. Webb and his wife, the parties to the agreement and the parties to the instrument evidencing



it, retained possession of it and it was never delivered to the plaintiff.

It will be noticed that all through this instrument there is no word of present gift or transfer, and I can find no intention to vest any present interest in the plaintiff either in possession or remainder in the property in question. Mrs. Webb makes no declaration that she will stand seized of the property for the benefit of the plaintiff, or hold the property for its benefit, and clearly the covenants in the instrument between Mr. Webb and his wife could not be enforced by the plaintiff, there being no consideration passing from the plaintiff and the plaintiff not being a party to the instrument. There was plainly an agreement between those owning the property and having an absolute right to it, by which they agreed as between themselves that there should be a gift of the property to the plaintiff after Mrs. Webb's death. The plaintiff, however, acquired no present interest in the property and no present right to enforce the agreement. I suppose it could hardly be claimed that if the plaintiff had acquired knowledge of the execution of this instrument by Mr. and Mrs. Webb during Mr. Webb's lifetime, and had filed a bill to compel Mrs. Webb to execute a declaration of trust in its favor, such an action could have been maintained; and yet, as I view it, to sustain this judgment the plaintiff must have acquired a present interest in or title to the property which inured to it upon the execution of the instrument. Whatever title or interest the plaintiff acquired in or to the property must have been acquired upon the execution of the instrument. This instrument remained in the possession of Mr. Webb until the month of October, 1899, when he gave it to his counsel, who has retained it from that time to the present. On October 3, 1899, Mr. and Mrs. Webb executed an agreement reciting these conveyances, and also reciting that in pursuance to the agreements and arrangements under which they were executed, Mrs. Webb had entered into an agreement with Mr. Webb, dated the 26th day of September, 1889, whereby she agreed that she would vest in the plaintiff the fee simple of the premises, subject to an estate in her for life; and "whereas, for various reasons, the parties hereto have become dissatisfied with the said agreement and the disposition thereby agreed to be made of said premises, and

are desirous of canceling said agreement and making a new disposition of said premises, and the party of the first part (Mrs. Webb) has agreed, in consideration that she shall be released from said agreement and all obligation and liability thereunder, that she will enter into a new agreement pursuant to the original understanding and arrangement upon which said premises were conveyed to her, and providing that in case she shall survive the party of the second part (Mr. Webb) and the title to said premises shall become vested in her, she will forthwith devise or convey the said premises in fee to William E. Webb, the son of the parties hereto subject to an estate in her for life;" and it is then agreed that the parties cancel and annul the said agreement, bearing date the 26th day of September, 1889, "and all covenants and agreements and provisions therein contained and all obligations and liability thereunder or arising therefrom;" and that Mrs. Webb agreed to convey the premises to her son in pursuance of the agreement entered into between them. Whatever part of the agreement of September 26, 1889, was executory was, therefore, canceled and released by this new indenture of the 3d of October, 1899, and whatever Mr. Webb, who had been the owner of the property, and with whom the covenant as to the conveyance to the plaintiff was made, could do to release Mrs. Webb from any obligation that she assumed under the contract was done. Consequently, unless the plaintiff had acquired some interest in the property that a court of equity would enforce, there was nothing left of the agreement which was enforceable.

An essential part of the due execution of an instrument granting or conveying an interest in land is delivery, and such an instrument never takes effect until delivery, and treating all these instruments as one instrument by which Mr. Webb intended to convey his land so that he would be entitled to retain a life estate, with remainder to his wife, and remainder over to the plaintiff, his retention of the instrument was not a delivery which would vest the plaintiff with any interest in the land; and, as I view it, the agreement being without consideration, so far as the plaintiff was concerned, it could vest no present title in the plaintiff until a delivery. There being no declaration of trust, or words that would act as a present limitation of Mrs. Webb's estate in remainder which had vested in her by the execution of the deed from Hidden to her, I cannot see that

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there was any estate in the land to which the plaintiff was entitled, or any contract or declaration of trust which a court of equity could enforce. The agreement that the plaintiff seeks to enforce was a voluntary agreement by which the plaintiff was to be entitled to this land upon the death of Mrs. Webb. The agreement never was delivered to the plaintiff, or any one for its benefit. There was no consideration. No title or interest, either as grantee or as *cestui que trust*, ever vested in the plaintiff, and the parties to the agreement, before it had ever become an executed agreement, so far as the plaintiff was concerned, revoked and canceled it and made other disposition of the property.

It seems to me to follow that there could be no enforcement of this agreement in equity, and that the defendants were entitled to judgment.

Judgment reversed, new trial ordered before another referee, costs to appellants to abide event. Settle order on notice.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WALDORF-ASTORIA HOTEL COMPANY, Appellant.

First Department, March 22, 1907.\*

**Game Law — sale of English pheasants killed in other States unlawful — section 141 of the Forest, Fish and Game Law not unconstitutional.**

By virtue of section 31 of the Forest, Fish and Game Law, providing that there shall be no open season for English pheasants, nor shall the same be killed or possessed except in the county of Suffolk until the year 1910, and that such pheasants bred or liberated in Suffolk county by game clubs and private owners may be possessed in Greater New York for consumption but not for sale, and by virtue of section 141 of the said act which provides that the prohibitions therein contained refer equally to game coming from without the State, a defendant who offers English pheasants killed in another State for sale in the city of New York is properly convicted of a violation of the statute.

Section 141, prohibiting the possession of game brought from foreign States, is not in violation of the State or Federal Constitution.

APPEAL by the defendant, the Waldorf-Astoria Hotel Company, from a judgment of the Supreme Court in favor of the plaintiff,

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\* Received too late for insertion in proper place.—[REP.]

entered in the office of the clerk of the county of New York, upon the decision of the court rendered after a trial at the New York Trial Term without a jury.

*George W. Wickersham*, for the appellant.

*Robert C. Beatty*, for the respondent.

INGRAHAM, J. :

The question here presented arises under section 31 of the Forest, Fish and Game Law (Laws of 1900, chap. 20 as amd. by Laws of 1904, chap. 582).

The conceded facts upon which this case was tried are that certain English pheasants were possessed by the defendant on the dates alleged in the complaint for sale; that these English pheasants were bred and killed in the State of New Jersey and purchased by the defendant in that State. The trial court held as a conclusion of law that the possession of these pheasants was a violation of section 31 of the Forest, Fish and Game Law. Section 31 is as follows: "There shall be no open season for \* \* \* English pheasants, nor shall the same be killed or possessed, except in the county of Suffolk, prior to the year nineteen hundred and ten; provided, however, that pheasants bred or purchased and liberated in Suffolk county, by the game clubs and private owners, may be possessed in Greater New York for consumption, but not for sale." And section 141 of the same act, which was added by chapter 194 of the Laws of 1902, provides that "wherever in this act the possession of fish or game, or the flesh of any animal, bird or fish, is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State."

The possession of English pheasants for sale in the city of New York, whether killed in a foreign State or not, and whether for consumption or sale, is prohibited. Within the territory of Greater New York pheasants bred or purchased and liberated in Suffolk county by the game clubs and private owners may be possessed for consumption, but not for sale. Therefore, no one can be possessed of English pheasants in the city of New York for sale before 1910. It is conceded that the birds in possession of the defendant were neither bred nor purchased and liberated in Suffolk county, and so

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it would appear that the possession of these birds in the city of New York was a violation of the statute.

The Legislature having jurisdiction to prohibit absolutely the possession of these birds at any time within the State, could allow birds killed, bred or purchased in a certain locality to be possessed for consumption; and prohibit the possession of birds killed in other counties or in a foreign country or State. It is contended, however, that this section is a violation of the 14th amendment to the Federal Constitution, and of the State Constitution. The decision of the Court of Appeals in *People v. Buffalo Fish Co.* (164 N. Y. 93) only decided that on the construction of sections 110 and 112 of the Fisheries, Game and Forest Law (Laws of 1892, chap. 488, as respectively amd. by Laws of 1898, chap. 109, and Laws of 1896, chap. 531, and title of act changed by Laws of 1895, chap. 395), those sections did not then apply to fish taken without the State. That case was decided in the year 1900 and section 141 of the Forest, Fish and Game Law was not then a part of the act, but was added by chapter 194 of the Laws of 1902, so the provisions of said section 141 were not before the court. The conclusion as to the constitutional question by Judge O'BRIEN was concurred in by PARKER, Ch. J., and LANDON, J.; Judges GRAY, HAIGHT and MARTIN expressly dissented. They held the statute constitutional even containing, as they construed it, prohibition as to the possession of game purchased without the State. Judge WERNER concurred upon the construction of the statute — that it did not prohibit the possession of fish caught without the State. The case, therefore, seems to be that three judges held a provision prohibiting the possession of fish taken without the State to be unconstitutional; three judges held it to be constitutional; and one judge expressed no opinion upon that question.

The court, however, in the later case of *People ex rel. Hill v. Hesterberg* (184 N. Y. 126), following the case of *People v. Bootman* (180 N. Y. 1), expressly held that it was within the power of the Legislature in order to effect the preservation of game within the State to enact not only a close season during which the possession of such game should be unlawful, but also to enact a provision that the possession during such season of game taken without the State should be also unlawful. In *People v. Bootman* (*supra*) the court said: "The right to pass laws for the protection of game being con-

ceded, as in view of the authorities it must be, the method of affording protection is necessarily within the discretion of the Legislature. It may provide a close season for the taking of game, and may prohibit the possession or sale of game during that season. It may close the game market throughout the State during the period of prohibition, in order to remove temptation from poachers and pot-hunters, who are not apt to run the risk of taking game out of season if they cannot sell it. To do this effectively it may be necessary to close the market as to game taken without the State, as well as within, for there are no marks by which birds killed in Michigan can be distinguished from those killed in New York. When enacting a game law the Legislature may provide for its ready enforcement, not simply by making the possession of game during the close season presumptive evidence of a violation of the statute, but it may go farther and in order to prevent evasion, fraud and perjury, may prohibit the possession of game in this State during the close season, even if it was taken in another State and brought here during the open season. \* \* \* Such provisions are warranted by the police power, and are not in conflict with either the State or Federal Constitution."

The Legislature thus having the power the method adopted was within its discretion, which the courts have no power to review. If it could prohibit the possession of birds killed in the whole State or in a foreign State or country, I can see no reason why it cannot prohibit the possession of birds killed in a foreign State and all parts of the State except one county; and if it could absolutely prohibit the possession of birds killed in all but one county, it could prohibit the possession of birds for sale from that one county, allowing the possession of such birds merely for the purpose of consumption. If the sale of birds is prevented it is quite apparent that the number of birds killed will be greatly reduced. The power to absolutely prohibit seems to me to involve the power to conditionally prohibit, and the conditions that are to be imposed upon the possession of any birds within the prohibited period is necessarily within the discretion of the Legislature.

The cases cited by the learned counsel for the appellant which relate to the ordinary vocation of the people, or the right to possess and sell personal property generally, have no relation to game over

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which the Legislature has a peculiar power not applicable to personal property in general. That was the effect of the decision in the *Bootman Case* (*supra*) as I understand it; as the distinction is there plainly drawn between game in which the people of the State have a peculiar interest, and ordinary personal property, the possession and ownership of which is protected by the Constitution.

I think, therefore, that this judgment was right and should be affirmed.

PATTERSON, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Judgment affirmed. \_\_\_\_\_

WILLIAM F. INGOLD, Respondent, v. EDWARD G. GILMORE,  
Appellant.

First Department, March 23, 1907.\*

**Banking — party — liquidating agent of national bank may be sued in State court for accounting.**

The liquidating agent of a national bank appointed by the stockholders under the authority of section 3 of the act of Congress of June 30, 1876, is a trustee for the benefit of the stockholders, and although he is under the control of the Federal courts as to compromising debts and filing the account of his proceedings he may nevertheless be sued in the Supreme Court of the State of New York by a stockholder for an accounting in equity.

Such agent does not occupy the position of a receiver and he may sue and be sued without leave of court.

APPEAL by the defendant, Edward G. Gilmore, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of November, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint.

*Charles A. Hess*, for the appellant.

*C. A. Mountjoy*, for the respondent.

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\* Received too late for insertion in proper place.— [REP.]

INGRAHAM, J. :

The plaintiff sues as a stockholder of the Equitable National Bank, a corporation organized under the laws of the United States, on behalf of himself and all other stockholders of the corporation who may elect to come into the action.

The complaint alleges that the Equitable National Bank, a banking corporation organized under the National Banking Act, went into voluntary liquidation and that one Ridgely was appointed receiver by the Comptroller of the Currency ; that subsequently the defendant was elected by the stockholders as their agent to continue the liquidation and wind up the affairs of the bank ; that all of the depositors of said bank had been paid in full and the defendant has in his hands a large amount of money and assets belonging to said bank undistributed, to which the plaintiff and the other stockholders were entitled ; and the relief asked is that the defendant account as such stockholders' agent and that a distribution of the property of the bank be made among the stockholders.

The defendant demurred to this complaint on the ground that the court had no jurisdiction of the defendant, or of the subject-matter of the action, which was overruled and defendant appeals.

Section 3 of the act of Congress of June 30, 1876 (19 U. S. Stat. at Large, 63, as amd. by 29 id. 600, chap. 354), provides that whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section 5234 and other sections of the Revised Statutes of the United States, and when, as provided in section 5236 thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of the association and at such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose. It then provides that in case a majority shall determine that an agent



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shall be elected, the said meeting shall thereupon proceed to elect an agent, whereupon, after the execution and filing of an indemnity bond of the shareholders for the payment and discharge in full of claims and the performance of duties as therein prescribed, the Comptroller and the receiver shall transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them. It further provides that upon receiving such assignment, transfer or other instrument the person elected such agent shall hold, control and dispose of the assets and property of such association for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, "and may sell, compromise, or compound the debts due to such association, with the consent and approval of the Circuit or District Court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such District or Circuit Court a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond." The statute then provides for the election of a new agent in case of a vacancy and provides that "when such agent \* \* \* shall have executed a bond to the shareholders \* \* \* to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided." The statute further provides as follows: "The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows: *First.* To pay the expenses of the execution of the trust to the date of such payment. *Second.* To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with

the provisions of the statutes of the United States; and *Third*. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

This agent, elected by the stockholders, occupied an entirely different position from a receiver appointed by either the United States court or the Comptroller of the Currency. He is elected by the stockholders, and receives the assets of the bank in trust for them. He may sue and be sued without leave of any court, and may do all other lawful acts and things necessary to finally settle the affairs of the association and distribute the assets and property in his hands among the stockholders. The act of Congress provides how he may be appointed, but having once been appointed he becomes the agent of the stockholders to liquidate the affairs of the association for their benefit. But when Congress allowed the stockholders of the bank to liquidate its affairs by appointing an agent for that purpose, and by such appointment taking out of the hands of the officials of the United States the control of the undistributed assets of the bank and intrusting such control to the agent appointed by the stockholders, it would appear that the stockholders had the right to enforce the performance of the trust by their agent in such courts as would have jurisdiction for that purpose over any trustee or agent. The statute gives the courts of the United States control over such an agent in two particulars. In the first place, the agent is authorized to "sell, compromise or compound the debts due to such association, with the consent and approval of the Circuit or District Court of the United States for the district where the business of such association was carried on;" and the agent, at the conclusion of his trust, is required to render to such Circuit or District Court a full account of his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. The authority to compromise debts due to the association, with the approval of the United States Circuit or District Court, has no relation to enforcing the rights of the stockholders against the agent. There is a clear distinction between an action brought to require the agent to distribute the assets and the approval of his

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accounts after the assets are all collected and distributed. One has relation to the discharge of the agent from his liability as agent and the release of his sureties after his duties are completed, and the other is to require the agent to perform his trust and to make the distribution. A court of equity has general jurisdiction over trustees and agents to compel them to account; and whatever the source of the agency, it assumes jurisdiction over the agent or trustee to compel him to perform his trust. I can find nothing in this act which takes this agent out of the general jurisdiction of a court of equity. The statute expressly provides that the agent may sue and be sued, and such suits are not limited to actions brought in the Federal courts. I suppose there could be no doubt that if this agent had in his possession property belonging to a third party which he had received by transfer from the receiver or Comptroller of the Currency, the owner of the property could maintain an action against the agent to recover the possession of it in a State court as well as the Federal courts. The agent has in his possession all the property and assets of this association which belonged to its shareholders. An accounting is necessary so as to ascertain the amount that each shareholder is entitled to receive; and any court of equity having jurisdiction over the person of the agent has power to compel him to execute the trust and supervise its execution. It may well be that after the trust is completed under the authority of a judgment of a competent court of equity, the agent will be required to file with the Federal court an account of his proceedings, but that is not at all inconsistent with the jurisdiction of a court of equity to compel him to perform his duties and execute the trust. The fact that the plaintiff asks more relief than he would be entitled to is not a ground of demurrer. The court has jurisdiction to grant any relief that may be necessary to enforce the execution of the trust.

*Matter of Chetwood* (165 U. S. 443) is in line with this conclusion. It was there held that a receiver appointed by the Comptroller of the Currency was not an officer of any court, but an agent and officer of the United States, and that a State court had jurisdiction against a receiver of a national bank appointed by the Comptroller of the Currency in an action brought by a stockholder on behalf of the bank to enforce obligations due to the bank, and to which the

receiver was a party; that the substitution of an agent for a receiver did not oust the jurisdiction of the State courts; that he was no more an officer of the Circuit Court in the first instance than a receiver was, and then, after quoting the statute, the court said: "But there is nothing in the language of the statute from which it can be inferred that it was the intention that the jurisdiction of State courts of competent and concurrent jurisdiction, first obtained, should be interfered with by restraining orders issued by Federal courts on the application of such an agent. The agent may indeed intervene in a case in the State court and receive the fruits of the litigation to be administered, subject to the final approval of the Federal court." The same rule was followed by the Circuit Court of Appeals in *Guarantee Co. of North Dakota v. Hanway* (44 C. C. A. 312). As the jurisdiction of a court of equity attaches to all trustees, the court has power to compel any trustee or agent to account. The Supreme Court of the State has, therefore, jurisdiction to compel the defendant to execute his trust; and has, therefore, jurisdiction both of the subject of the action and the person of the defendant.

It follows that the judgment appealed from is affirmed, with costs, with leave to the defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below.

PATTERSON, P. J., McLAUGHLIN, CLARKE and HOUGHTON, JJ., concurred.

Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below.

EUGENE C. GILROY, as Receiver of the Property of the COLUMBIA PUBLISHING COMPANY, Appellant, v. EVERSON-HICKOK COMPANY and HICKOK PRINTING COMPANY, Respondents.

First Department, April 5, 1907.

**Evidence**—parol evidence to show that written contract of sale was conditional—when seller and receiver in supplementary proceedings estopped from claiming title—when receiver cannot show want of consideration for transfer—replevin—insufficient evidence of defendant's damage.

Although parol evidence is admissible to show that a writing which is in form a complete contract was not to become binding until the performance of a condition precedent resting in parol, the evidence should be confined strictly to the condition. The rule does not admit general conversations had at the time of the execution of the contract, or the general circumstances under which it was executed.

When chattels have been sold and delivered and the purchaser has resold the chattels for value without the original owner ever having sought to retake the property upon the ground that title had not passed because an alleged condition precedent had not been performed, the owner and its receiver will be deemed to have waived compliance with the condition and are estopped from claiming that title did not pass to the second purchaser.

A receiver in supplementary proceedings only obtains title to property owned by the judgment debtor at the time of his appointment. When the judgment debtor transferred property prior to the receivership the receiver cannot show lack of consideration in an action of replevin. Even if the transfer be fraudulent as to creditors, the action to set aside the transfer for lack of consideration must be in equity.

When in an action of replevin no evidence as to the value of the property at the time of trial is given other than the plaintiff's affidavit as to its value made four years prior to trial, the jury is not entitled to assess the defendant's damages at the figure stated in the affidavit.

INGRAHAM and CLARKE, JJ., dissented, with opinion.

APPEAL by the plaintiff, Eugene C. Gilroy, as receiver, etc., from a judgment of the Supreme Court in favor of the defendant, the Hickok Printing Company, entered in the office of the clerk of the county of New York on the 13th day of October, 1906, upon the verdict of a jury rendered after a trial at the New York Trial Term.

*Charles W. Dayton, Jr.*, for the appellant.

*Isaac N. Miller*, for the respondent, Hickok Printing Company.

HOUGHTON, J. :

The action is in replevin, brought by the plaintiff as receiver in supplementary proceedings of the property of the Columbia Publishing Company. The plaintiff was appointed such receiver on the 30th day of June, 1902. The property replevied consisted of printing presses, type, motors, shafting and other articles incident to a printing plant, and on the 10th day of May, 1900, was in possession of and owned, subject to certain incumbrances, by the Columbia Publishing Company. On that day the Columbia Company entered into an agreement to sell the printing plant in question to the Everson-Hickok Company, and on the twenty-second day of that month executed and delivered a bill of sale thereof, containing a covenant of warranty of title. On the following day the Everson-Hickok Company acknowledged by indorsement on the contract of sale that it had received delivery of the property mentioned therein. The property remained in the undisturbed possession and use of the Everson-Hickok Company until March 9, 1901, when it was transferred by bill of sale expressing a valuable consideration by way of assumption of debts, and delivered to defendant Hickok Printing Company. The complaint alleges that the Columbia Publishing Company demanded the return of the property on the 22d day of February, 1901, but I find no proof in the record of that fact, and it is expressly denied in the answer of the Everson-Hickok Company. The property remained in the possession and use of the Hickok Printing Company from the time of the transfer to it until September 12, 1902, when it was seized by the replevin process issued herein. Demand upon the latter company for its return was made by the plaintiff some time between June 30, 1902, and the commencement of the action. The property was sold at public auction.

At the close of the plaintiff's case the court dismissed the complaint and proceeded to try the issue as to the value of the property. From the judgment entered the plaintiff appeals.

The case was before this court on a former appeal (103 App. Div. 574), on the pleadings and opening of counsel for plaintiff, and it was held that the plaintiff could not maintain this action at law in replevin because the possession of the property had been delivered by the Columbia Publishing Company, the judgment debtor, uncon-

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ditionally to the Everson-Hickok Company, which had transferred it to the Hickok Printing Company prior to plaintiff's appointment as receiver. The judgment was reversed, however, because the value of the property, which could not be restored, was improperly assessed. The prior record on appeal contained the bills of sale and all the facts relating to them which appear in the present record.

The appellant concedes that the law of the case as established on the former appeal must now prevail, but complains of the exclusion of certain evidence which he sought to introduce tending to show that the bill of sale from the Columbia Publishing Company to the Everson-Hickok Company was delivered conditionally, and that the delivery of the property and of the bill of sale was not to take effect as a transfer until certain conditions on the part of the vendee had been complied with.

There is no question as to the rule of law enunciated in *Reynolds v. Robinson* (110 N. Y. 654) and kindred cases, that parol evidence is admissible to show that a writing which is, in form, a complete contract, of which there has been a manual tradition, was not to become a binding contract until the performance of some condition precedent resting in parol. It was under this rule that the counsel for appellant sought to introduce his evidence. In his argument to the court, which appears in the record, he announced the rule, to which the court assented. The questions which he put to his witnesses, however, I do not think called for answers within the rule. They either called for the broad conversations had at the time of the execution of the bill of sale, which might tend to vary its terms, or for the general circumstances under which it was executed. The rule permitting parol evidence of the conditional delivery of a complete contract in writing is a very narrow one, and as is said in *Reynolds v. Robinson* (*supra*) should be cautiously applied and confined strictly to cases coming clearly within it. To avoid any question that the evidence which the plaintiff sought to elicit might tend to vary the terms of the written bill of sale, the questions should have been confined to what was said upon its delivery respecting any conditions as to its taking effect as an absolute transfer. The evils to which any loose application of the rule might lead are well illustrated by the present case. The bill of sale was delivered by the Columbia Publishing Company to the Everson-

Hickok Company and the property actually delivered and the precaution taken of having the Everson-Hickok Company acknowledge in writing the receipt of the property, which was permitted to remain in the possession of the latter, without demand for compliance with any of the alleged conditions, until it was actually sold and delivered to the Hickok Printing Company. Even then, there was no complaint on the part of the Columbia Publishing Company until it was unable to pay a judgment, when a receiver in supplementary proceedings was appointed, who made demand and sought to regain the property on the ground that the title never passed from the Columbia Publishing Company because some condition was attached to its delivery and sale. Under these circumstances, if the rule respecting parol evidence of conditional delivery applies to all, it should be applied with great caution and only when the proposed evidence comes strictly within the rule. In addition, I think the Columbia Publishing Company and its receiver conclusively waived compliance with the condition, if any existed, and that plaintiff is estopped from now claiming that title never passed to the subsequent purchaser.

The appellant also complains that he was not permitted to show the consideration for the transfer of the property. This broad question was not open for consideration in an action at law such as the present one is. If the property was transferred to the Everson-Hickok Company without consideration, or even inadequate consideration, still they obtained title. Such title may have been fraudulent as to creditors and subject to be set aside; but in such a case, the receiver in supplementary proceedings must bring an action in equity for that purpose. He can obtain no such relief in an action at law, for his title to property is confined to that owned by the judgment debtor at the time of his appointment. (*Stephens v. Meriden Britannia Co.*, 160 N. Y. 178.) The legal title had passed from the judgment debtor at the time the plaintiff was appointed receiver, not only by unconditional delivery and waiver of conditions, but by estoppel as well, and he, therefore, could not replevin the property, and his complaint was properly dismissed.

There was error, however, in assessing the value of the property. The jury rendered a verdict, finding the present value of the property \$5,500. They allowed no damages for detention or use aside



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from the legal interest on that amount. The proof on the part of defendant was that the value of the property at the time of the trial was \$3,300. The property sold at auction for \$1,550. The court instructed the jury that they must find the value of the property at the time of the trial, and that they might allow interest upon the value of the property at the time it was taken, as damages, or they might allow the usable value from such time. The only proof that the property was of the value of \$5,500 at the time of the trial was that contained in the affidavit of the plaintiff which accompanied his requisition to the sheriff. This affidavit was made four years before the trial and was insufficient proof upon which to base a finding of value four years later, as was held on the former appeal. The jury might have found the value to have been \$3,300 at the time of the trial, and have allowed a further sum for depreciation, but this they did not do except by way of interest.

The plaintiff made a motion for a new trial, and one of the specific grounds was that the jury had used as a basis for their verdict the value stated in the affidavit made in 1902. No order denying the motion for a new trial appears in the record, and the appeal is from the judgment only. There is some question whether or not even a specific objection to the verdict, of this character, is raised without the formal entry of the order denying the motion for a new trial and an appeal therefrom. The plaintiff objected to the receipt of the evidence, however, on the specific ground that it was immaterial to show value of the property on the day of the trial, and took an exception to the overruling of his objection. So far as the issues were concerned, the affidavit bore only upon the question of value, and thus a case is presented where it is proper to provide that the judgment should be reversed and a new trial granted, with costs to appellant to abide event, unless the defendant stipulates to reduce the judgment to \$3,300 and interest thereon from the time of the seizure of the property, and costs, in which case the judgment should be affirmed, without costs of this appeal, which I think is the disposition that should be made of this case.

PATTERSON, P. J., and McLAUGHLIN, J., concurred; INGRAHAM and CLARKE, JJ., dissented.

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INGRAHAM, J. (dissenting):

This action was tried before and resulted in a judgment dismissing the complaint on the opening of counsel with certain documentary evidence which was admitted in evidence. Upon an appeal to this court this judgment was reversed and a new trial ordered (103 App. Div. 574), upon the ground as it then appeared that there was an unconditional delivery of the property which vested the vendee with the legal title, the plaintiff as receiver of the vendor could not maintain an action at law to recover possession of the property. Upon the new trial the plaintiff sought to prove that there was no unconditional delivery of the property, and that a bill of sale of the property to the defendant Everson-Hickok Company was delivered conditionally, which was excluded by the court, and the question presented upon this appeal is whether the exclusion of that testimony was error. There is no question but that the Columbia Publishing Company, of which the plaintiff is receiver, was the owner of the property. It made a contract to sell it to the defendant the Everson-Hickok Company, the consideration for such sale to be the stock of the defendant Everson-Hickok Company of the par value of \$7,500. As a part of this agreement the Everson-Hickok Company agreed to increase its capital stock to \$15,000, and thereupon to purchase the said printing plant, subject to an incumbrance of \$1,600, at and for the sum of \$7,500, payable by the issue of capital stock to the par value of \$7,500, and the contract contained the following provision: "*Eighth.* It is mutually agreed that, upon the execution of this agreement, the various covenants shall be simultaneously performed and carried into effect, each being conditioned upon the others."

The property consisted of printing presses, type and other bulky machinery. The agreement for the sale was dated the 10th of May, 1900, and on the 23d of May, 1900, the Everson-Hickok Company indorsed upon this agreement a receipt as follows: "Received, New York, May 23rd, 1900. The within mentioned plant as per within agreement."

The president of the Columbia Publishing Company was called as a witness, and testified that after the execution of the agreement he had a conversation with Mr. Everson, who was president of the Everson-Hickok Company; that between the 10th of May, 1900,

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and the 22d day of May, 1900, the machinery referred to in this bill of sale was delivered over to the Everson-Hickok Company. He was then asked whether any stock of the Everson-Hickok Company had ever been delivered to the Columbia Publishing Company, or if any of the other conditions of the contract were carried out. This was objected to, the objection sustained and the defendant excepted. There was then produced an instrument under seal dated May 22, 1900, whereby the Columbia Company granted and conveyed to the Everson-Hickok Company the personal property in controversy, and the witness was asked to state the circumstances under which this bill of sale was executed at the time. That was objected to as immaterial and irrelevant. Then counsel stated to the court: "It is the contention of the plaintiff here that there was no consideration for it and that it was a *nudum pactum*, for the reason that the conditions under which it was delivered had not been carried out, and also I intend to show by this witness that there was an oral agreement at the time it was delivered that it should not take effect until these conditions were complied with." Upon that statement of the object of the question the court sustained the objection and the defendant excepted. The secretary of the Columbia Publishing Company was then called as a witness and stated that the receipt of this property was indorsed upon the bill of sale in his presence; and he was then asked, "And what conversation did you have with Mr. Everson at that time?" That was objected to as immaterial, irrelevant and incompetent, when counsel for the plaintiff stated that he sought to show the condition under which the contract was executed and the property delivered. The objection was sustained, and the defendant excepted. Various questions were then asked in relation to the conversations had between the parties executing the contract and bill of sale at the time they were executed, which were all excluded. The bill of sale was then introduced in evidence by the plaintiff, and it rested, and the defendant moved to dismiss the complaint, which motion was granted; and the court then submitted to the jury the question as to the value of the property that had been replevined in the action. The jury fixed such value for which the defendant had judgment against the plaintiff.

Under the contract of sale it was the intention of the parties that

the property should be delivered, and that the stock which was the consideration of the sale and delivery of the property should be issued and delivered to the plaintiff simultaneously. The title, therefore, to the property would not vest in the vendee until the condition had been complied with, namely, the delivery of the stock to the Columbia Publishing Company, unless that company should waive the condition. Undoubtedly an unconditional delivery of the property, without exacting the delivery of the consideration, would be a waiver of the condition; and the delivery of a bill of sale of the property after the vendee was in actual possession would waive the condition and would vest the title to the property in the vendee. If this bill of sale had not been under seal, there could be no question but that the plaintiff would be entitled to prove that it was delivered upon a condition which would not make the delivery absolute until the performance of the condition, the rule being that "an instrument, not under seal, may be delivered upon conditions the observance of which, as between the parties, is essential to its validity; and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation." (*Bookstaver v. Jayne*, 60 N. Y. 146; *Higgins v. Ridgway*, 153 id. 130.) The effect of a conditional delivery of an instrument under seal was presented to the Court of Appeals in the case of *Blewitt v. Boorum* (142 N. Y. 357). That action was for an accounting under an instrument under seal. The defendants admitted the execution of the contract, but alleged that it had been executed upon the parol condition that it was not to operate as a contract until the plaintiff acquired the interest of a third person in the patent spoken of in the agreement, and that the plaintiff had never performed the condition. The evidence to prove this contention was admitted by the court, who found the facts in accordance with the defendants' contention and gave judgment dismissing the complaint. This was affirmed by the General Term and by the Court of Appeals. Judge PECKHAM in delivering the opinion, after a discussion of the authorities, which had held that a deed or conveyance could not be delivered to the grantee in escrow because then a bare averment without any writing would make void every deed, states his conclusion as follows: "As a result of the examination of the English authorities I think it is clear that the presence of

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a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that where parol evidence was disallowed it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of a writing, although under seal, may be shown to have been under an agreement that it was not to operate as such until the happening of some future event." The learned judge then considered *Lovett v. Adams* (3 Wend. 380) where it was said that "if a bond be signed and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act by the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent be performed. Until then there is no contract," and the other cases in this State sustaining the same conclusion. The distinction between cases relating to deeds conveying real estate and other kinds of written instruments is then adverted to, and the conclusion was that the rule had been established in this State that as to all instruments, whether under seal or not, except instruments relating to land, a delivery of the instrument upon a condition that it is not to take effect until the happening of the condition can be proved by parol and there is no delivery until the happening of the condition. A bill of sale of personal property is not an instrument which requires a seal to make it valid, and the rule as to sealed instruments is not extended in any event to those cases where the instrument is in law not in the nature of a specialty and where the presence of a seal is totally unnecessary to its validity. The plaintiff, therefore, had a right to prove by parol that there was no unconditional delivery either of the property itself or of the bill of sale which vested the title in the company. The title did not pass under the contract for its sale until the consideration had been paid, unless this condition was waived by the vendor. An unconditional delivery would waive the condition, but the vendor had the right to show that a delivery of the property was not unconditional. A delivery of a bill of sale would waive the condition, but the plaintiff also had the right to show that the bill of sale was also delivered upon a condition by which it was not to become effective until the happening of the

event upon which the delivery was conditioned. I think, therefore, that the court excluded competent evidence tending to show these facts and that error was, therefore, committed which requires us to reverse the judgment.

The judgment should, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event, unless defendant stipulates to reduce the judgment as stated in opinion, in which event judgment as so modified affirmed, without costs. Settle order on notice.

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CARRIE C. CATT, Individually and as Executrix of and Trustee under the Last Will and Testament of GEORGE W. CATT, Deceased, Plaintiff, v. MARY CATT and Others, Defendants.

First Department, April 5, 1907.

**Will — trust for foreign charitable uses construed — when foreign unincorporated college cannot take — cy pres — gift to foreign unincorporated college not validated by chapter 701 of Laws of 1893.**

(Per PATTERSON, P. J., LAUGHLIN and SCOTT, JJ.): When a will makes a direct gift to an unincorporated college maintained by a foreign State which college is incapable to take, the provisions of chapter 701 of the Laws of 1893 providing that gifts to benevolent uses in other respects valid shall not fail by reason of the indefiniteness or uncertainty of beneficiaries, has no application. Said act applies to gifts of the character therein named which shall "in other respects be valid" under the laws of this State and gives no power to a foreign unincorporated association to take or hold either absolutely or as trustee.

(Per LAMBERT and LAUGHLIN, JJ.): When a testator gives the use of half of his residuary estate, both real and personal, to his wife for life and at her death the remainder to a foreign unincorporated college maintained by a foreign State, to be used to found scholarships, with the provision that the treasurer of the college shall be custodian of the fund, etc., the gift is not made for the personal benefit of the institution but for the purpose of holding the fund in trust to support scholarships.

Such gift is invalid and cannot be made valid on the assumption that it was made to the foreign State in trust for the purposes expressed. This, because

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a State, in the absence of special statutory authority, cannot take and hold property as trustee.

Although under the provisions of section 2903 of the Code of Iowa a devise or bequest may vest title in that State provided the same be accepted, a devise not accepted by the executive council of that State at the death of the testator cannot be validated by a subsequent acceptance, as the testator's heirs have acquired vested rights therein.

As an unincorporated association in the State of Iowa cannot take and hold property for the purposes of administering a charitable trust, the devise is not made valid if it be construed to be made to the treasurer of the college.

Such foreign unincorporated college acquires no rights under the provisions of chapter 701 of the Laws of 1893, for the laws of this State have no extraterritorial operation and our courts cannot act as a trustee in a foreign State. Said statute is designed only to foster permanent charitable trusts within this State.

(Per HOUGHTON, J.): The devise aforesaid could be sustained as a bequest for educational uses in a foreign State by virtue of chapter 701 of the Laws of 1893, as amended, but for the fact that under the will there was a clear intent to give the property directly and absolutely to the foreign college which cannot take.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Horace E. Parker*, for the plaintiff.

*Charles W. Mullan*, for the defendants.

LAMBERT, J. :

George W. Catt died on the 8th of October, 1905, leaving a last will and testament bearing date January 19, 1897, and a codicil bearing date September 20, 1905. This latter affects merely the details of the disposition of certain property, and need not be considered here. The testator devised certain real estate in Iowa to his mother and sister ; made provision for disposing of his engineering and economic libraries, and provided in the 4th paragraph as follows :

"*Fourth.* I give to my wife Carrie one-half of all my remaining property, both real and personal, absolutely, and do hereby give to her all the income from the other one-half during her life, and do constitute her a trustee of the said last half of my remaining property to keep and to hold the same during her life. At her death this last one-half of my remaining property shall then go to

the Iowa State College of Agriculture and Mechanic Arts, to be used to found as many scholarships of one hundred (\$100.00) dollars each as the income from the same will provide."

He then provides that the fund shall be known as the "Geo. W. Catt Scholarship Fund," and that the "scholarships shall be given to the most needy students in the sophomore year, provided the student ranks above the average rank of the class as a freshman in both scholarship and deportment; and these scholarships are to be continued through the remaining two years of the course if so voted annually by the Board of Award." He provides that the treasurer of the college shall be the custodian of the fund, and outlines a board of award, the details of which are not important here.

While the testator refers to his wife as a trustee of this remaining one-half of this estate, it is clear that the only effect of this provision of the will is to give her a life estate in the property, becoming, by virtue of her possession of the same and the ownership of the income, a trustee for the remaindermen. In other words, she is a life tenant, with the duty of preserving the corpus of the estate for the benefit of those who are entitled to it at her death. The question to be determined is whether the Iowa State College of Agriculture and Mechanic Arts, or the heirs of the testator, constitute the remaindermen.

It is conceded that the Iowa State College of Agriculture and Mechanic Arts is not a corporation having the authority under its charter to take by devise or bequest. It is not a corporation of any character. It is not even a voluntary association of individuals for the purpose of carrying on an educational work. It is merely an institution conducted by the State itself, without any legal entity. If it were an unincorporated association, the authorities are uniform in this State that it could not take and hold property by deed or will. (*Mount v. Tuttle*, 183 N. Y. 358, 367, and authority there cited.) But it is urged that the testator was a graduate of the said college; that he knew that it was a State institution, and that, gathering his intent thereby, this may be construed as a gift to the State of Iowa for the purposes pointed out in the will. The rule of construction, which calls upon the courts to give effect to the intent of the testator, requires that the intent should be found in the language and purpose of the will itself. We look in vain in the will



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for anything to indicate that the testator was a pupil of the institution, or that he had any other knowledge of its relation to the State than such as might be implied from the fact that it is known as the Iowa State College of Agriculture and Mechanic Arts, which might be the case if it was, in fact, a private or quasi public corporation. There is nothing in the language used by the testator which indicates any other intention than a gift to this college. This is evident from the fact that he provides that the fund shall be in the custody of the treasurer of the college, and all of the provisions in reference to the board of award relate to the classes, the faculty and the president of the college, giving no intimation that any one other than the college and those related to it in its capacity as a college are to have anything to do with the property. There is in the scheme of the testator a clearly expressed purpose of making a gift to the college, not for its present benefit, but for the purpose of holding the fund in trust to support scholarships to be awarded to a class of students who may desire to avail themselves of the same in the future. It was held in *Johnson v. Mayne* (4 Iowa 180) that a gift to an unincorporated church society might be sustained, in so far as it provided for an immediate gift for the erection of a church, but as to that portion which required the society to act as a trustee of a fund, and to pay expenses of a missionary, etc., the church had no power to act; so that in so far as the question here involved is concerned, the law of Iowa is in harmony with our own.

Unless it can be spelled out that the testator intended to make a gift to the State of Iowa, there is no possible ground on which the will in this particular may be sustained. As we have already pointed out, such an intention is negatived by the language of the will. While the facts and circumstances surrounding the making of the will may be shown for the purpose of construing the language used, we know of no rule which would permit of showing the history of the testator for the purpose of establishing that specific language, designating a trustee, was intended to mean something different.

But if it be assumed that the testator intended to make a gift to the State of Iowa, is that State qualified to take and hold real estate in the State of New York for the purpose expressed in this

will? There is no provision for converting the real estate into personalty; and it must be assumed that this will, relating to both real and personal property, has to do with some real estate in this jurisdiction. While the American and English Encyclopædia of Law (Vol. 28 [2d ed.], p. 954) lays down the proposition that each one of the States may be trustees and take and hold trust property and execute the same, and cites authorities, we do not find among the cases cited any substantial support for this doctrine. From the fact that, in the absence of a special statutory authority, the State may not be sued to compel an execution of the trust, the weight of reason would seem to be against the proposition; and this view has been taken by the courts of this State. In the case of *Levy v. Levy* (33 N. Y. 97) the testator had devised property primarily "to the people of the United States," to establish and maintain perpetually a school for the education of persons undefined, except as a class; and, secondarily, "to the people of the State of Virginia," for the same purpose. The court says: "Now, conceding that the testator intended as the trustee of the charity, the United States, as a political body, has it, as such, capacity to take and act? We are not advanced a single step towards a solution of the point by a concession that the United States government may take directly by gift, grant or devise, property for governmental use or benefit. If it takes under the devise and bequest of the testator, it must be upon the trust and for the special charity, viz., to found and perpetually conduct a school for agricultural instruction of a certain class of children in the State of Virginia. Is it, therefore, within the scope of its political corporate capacity to administer indefinite charitable trusts? It seems to me there can be but one answer. The United States exists under grants of power, express or implied, in a written Constitution, and the functions of all the departments are definitely limited and arranged. It is not within the express or implied powers of the government, as organized, to administer a charity. \* \* \* So, also, with regard to the State of Virginia, however comprehensive the Statesovereignty, its officers are regulated in their duties by a written Constitution, which does not contemplate special trust functions. Simply as a political corporation neither government has capacity to take or act. If, then, the devises and bequests were intended to be made to the United States, and to the State of Virginia, as polit-

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ical bodies, I think they are void, because neither the United States or the State is capable of taking as trustee for the management of the special charity." There was a division of the court upon some of the questions involved in the case cited, but in *Matter of Fox* (52 N. Y. 530, 533), ANDREWS, J., writing the opinion of the court, says: "It was held by this court in *Levy v. Levy* (33 N. Y. 97) that it (the United States) had no power to take lands by devise in trust for a charity," and it was equally decided that the State of Virginia was without such power. If it were necessary to decide the point, it seems clear that the weight of authority is against the power of a State, simply because it is a State, to take property for the purposes of a charitable trust. It may be that under the provisions of section 2903 of the Code of Iowa a devise or bequest might vest the title in that State, provided the same were accepted; but it is here conceded that the State has not accepted the provisions of this will through its executive council as provided by the laws of that State. This could not be accomplished by the official action of the State at this time, or at any time after the will became operative, for the obvious reason that such action could not have retroactive force. The will became operative upon the death of the testator. If the property under its provisions did not then vest in the college or the State, it passed to the heirs at law and next of kin of the testator and could not be divested by any act of the Legislature of the State of Iowa.

It being established beyond controversy that an unincorporated association cannot take and hold property for the purposes of administering a charitable trust, even in the State of Iowa, it follows that the gift is equally open to objection, if the devise be construed to the treasurer of the college, which has no legal entity. It was held in *Murray v. Miller, No. 1* (85 App. Div. 414; affd., 178 N. Y. 316) that a devise of real estate to the treasurer of an unincorporated religious association for its benefit was void. The beneficiaries under the original will in this case are the prospective students of the college. By the codicil this is modified, and the college itself is made the beneficiary as to a portion of the fund. The college having no legal existence, in the sense of being answerable to the beneficiaries through the intervention of the courts, its treasurer, as such, can have no powers higher than his official source, and the reason of the

rule which excludes an unincorporated association, applies equally to its treasurer or other nominal officers.

It only remains to determine whether the college can gain any rights under the provisions of chapter 701 of the Laws of 1893. This is entitled, "An act to regulate gifts for charitable purposes," and in section 1 provides: "No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects, be valid under the laws of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest, or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court." Section 2\* provides that the Supreme Court shall have control over such gifts, and that the "Attorney-General shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court."

The legislation of this State can have no extraterritorial operation, nor has this court any jurisdiction, or any tangible existence, outside of the geographical limitations of the State, and the Legislature could not have intended that it should be called upon to accept title to real and personal property for the purpose of administering a trust apart from its judicial functions. As the trustee of a trust to be administered in the State of Iowa, the court could have no existence, either to exercise its own legitimate functions as a court, or to answer to the requirements of the courts of the State where the beneficiaries of the trust are domiciled. The Supreme Court of this State, as a trustee in the State of Iowa, would be open to exactly the same objections which exist to any other unincorporated association; it would have no legal existence there. The obvious intention of the Legislature was not to provide for trusts of the character here attempted to be created for the benefit of the institutions of another State, but to foster permanent trusts for religious, educational, charitable and benevolent purposes within

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\* This section has been amended by chapter 291 of the Laws of 1901.—[REP.]

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our own State, and this view finds support in *Allen v. Stevens* (161 N. Y. 122, 141), where PARKER, Ch. J., after reviewing the conflicting decisions respecting charitable uses, sets forth the statute and says: "Reading the statute in the light of the events to which reference has been made, it seems to me very clear that the Legislature intended to restore the law of charitable trusts as declared in the *Williams* case;\* that having discovered that legislative enactment had operated to take away the power of the courts of equity to administer trusts that were indefinite as to beneficiaries, and had declared a permanent charity void unless the devise in trust was to a corporation already formed or to one to be created, it sought to restore that which had been taken away through another enactment."

That is what is intended by this statute — nothing more and nothing less than to restore to courts of equity the power to administer trusts that were indefinite as to beneficiaries, as the law had been declared in *Williams v. Williams* (8 N. Y. 525). It did not undertake to validate trusts which attempted to vest property in unincorporated associations, or other legal nonentities, but simply to restore to the courts the power within this State to administer charitable trusts, which power had been taken from them by statute. In the will and codicil now before this court the testator has attempted to make the Iowa State College of Agriculture and Mechanic Arts, a legal nonentity, not only a beneficiary, but a trustee for itself as such beneficiary. A trust of this character is condemned alike by the courts of this State and those of the State of Iowa, and the statute of 1893 here under consideration does not operate to validate the provisions of the will under which the Iowa institution is claiming a benefit.

The plaintiff should have judgment declaring invalid the trust provisions of the will in so far as they relate to the Iowa State College of Agriculture and Mechanic Arts.

LAUGHLIN, J., concurred.

PATTERSON, P. J. (concurring):

I concur with my associates in the conclusion that judgment upon the submission of the controversy in this case must be directed for the plaintiff. Apart from the considerations which have induced

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\* *Infra.* — [REP.]

others members of the court to reach that conclusion, I am of the opinion that the provisions of chapter 701 of the Laws of 1893 are not applicable to the gift made in the will now under consideration to or for the benefit of the Iowa State College of Agriculture and Mechanic Arts. There is no gift in trust for that college except in the general sense in which every gift for charity necessarily involves the idea of a trust relationship. But there is no trustee appointed in this will and the gift to the college is direct. Considering the 4th clause or section of the will only, the gift of the one-half of the estate upon the death of the testator's widow to the college is in my opinion a direct gift. (*Matter of Griffin*, 167 N. Y. 71; *Bird v. Merkle*, 144 id. 544; *Wetmore v. Parker*, 52 id. 450.) But when we come to consider the provisions of the codicil to the will, the intention of the testator to make a direct gift to the college becomes fully apparent, and while those provisions may for other reasons be invalid, nevertheless they may be resorted to for the purpose of ascertaining the intention of the testator. (*Van Kleeck v. Dutch Church of New York*, 20 Wend. 457; *Tilden v. Green*, 130 N. Y. 55; *Kiah v. Grenier*, 56 id. 220; *Marks v. Halligan*, 61 App. Div. 179; *Van Nostrand v. Moore*, 52 N. Y. 21.) We have, therefore, in the present case a gift to a legatee or devisee incapable of taking under the rule in *Owens v. Missionary Society of M. E. Church* (14 N. Y. 380) unless that rule is displaced by the provisions of the so-called Tilden Act contained in the statute of 1893, above cited. However, in *Mount v. Tuttle* (183 N. Y. 367) the Court of Appeals has declared that the rule in the *Owens* case is still in force.

As I view it, the act of 1893 was not intended to confer upon an institution or body or association, otherwise incapable of receiving a testamentary gift, the power to take by direct bequest or devise, and where it indisputably appears, as here, that it was the intention of the testator that the gift should go to a particular distinct nominated party, the act of 1893 does not empower the courts (to use the language of the Court of Appeals in *Mount v. Tuttle*) "to modify or alter the directions of a testator, but merely validates testamentary directions which before its enactment would have been void, and empowers the courts to enforce the execution of those directions." The act of 1893 in its 1st section relates only to validating a gift, grant, bequest or devise to religious, educational

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charitable or benevolent uses which *in other respects would be valid* by the laws of the State where there is indefiniteness or uncertainty of the persons designated as the beneficiaries, or where, in the instrument creating such gift, grant, etc., no person is named as trustee, in which latter event the title to the lands or property vests in the Supreme Court. The 2d section, as amended by chapter 291 of the Laws of 1901, gives to the Supreme Court control over gifts, grants, bequests and devises in all cases provided for by section 1 of the act, and provides that whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant, bequest or devise, etc., as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, bequest, etc., shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose expressed in the instrument. Referring back to section 1 of the act of 1893, it is plain that the act is intended to apply only to gifts, grants, bequests or devises of the character therein named which shall in other respects be valid under the laws of this State, and the gift, bequest or devise to an unincorporated institution is not valid under the laws of this State if the *Owens* case still controls—as it is said to control in *Mount v. Tuttle* (*supra*).

I find nothing in the act of 1893 or in the amendment of 1901 which gives power to an unincorporated association to take or hold such a gift as that intended by the testator in this case, either absolutely or as trustee. I am, therefore, of the opinion that this being a direct gift, demonstrably intended as such, the Iowa State College of Agriculture and Mechanic Arts cannot take.

LAUGHLIN and SCOTT, JJ., concurred.

HOUGHTON, J. (concurring):

I agree that neither the Iowa State College of Agriculture and Mechanic Arts nor the State of Iowa can take. Eliminating the codicil, I am inclined to the opinion that the will itself, under the law of this State as it now exists by virtue of chapter 701

of the Laws of 1893, as amended by chapter 291 of the Laws of 1901, could be sustained as a bequest for an educational use to found scholarships for needy and deserving students of the Iowa State College of Agriculture and Mechanic Arts, to be selected in a prescribed manner. To uphold the bequest it is true the college itself must be eliminated and the object of founding scholarships alone given effect. Such a construction, it seems to me, from the reading of the will itself is justified.

The act of 1893, as construed in *Allen v. Stevens* (161 N. Y. 122) and kindred cases, clearly revives the law of charitable uses. Under the doctrine of charitable uses, as well as by the statute, the naming of a trustee is not a necessity. So too, under that doctrine, the giving of property for a charitable purpose creates a trust. In *Moore's Heirs v. Moore's Devisees* (4 Dana, [Ky.] 354) the rule is summarized as follows: "Wherever a person by will gives property and points out the object, the property and the way it shall go, a trust is created. \* \* \* When such a trust is created a court of equity will support and enforce it even if the donor had appointed no trustee and had let the legal title go to his heirs; for it is well settled that where there is a beneficial trust a court of equity will act as trustee, or appoint one if necessary, for effectuating the objects of the grantor."

In *Hornbeck's Executor v. American Bible Society* (2 Sandf. Ch. 133) it was held that bequests for charitable purposes even to unincorporated societies can be sustained where the object is competent and is designated or may be clearly ascertained. The will, therefore, although it named no trustee, which was not a necessity, provides for a charitable bequest, which by virtue of its character must be deemed a trust for a certain object, to wit, scholarships for worthy and deserving students of the college. The statute provides that the gift shall not fail for indefiniteness of the beneficiary. If the bequest be in trust, as it would seem it must be deemed to be, the beneficiaries are not fatally indefinite, nor as indefinite as in many of the cases, which I have been at some pains to collect, in all of which the provisions of the will were held to be valid and which are as follows: "Education of the children of the poor" (*Williams v. Williams*, 8 N. Y. 525); "Founding a scholarship" for the preparation for the ministry of one of testator's kindred, to be selected (*Andrews v. General Theological Seminary*, 8 N. Y. 559); "For



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the advancement of the Christian religion amongst infidels in North America" (*Attorney-General v. City of London*, 3 Bro. C. C. 171); "For poor clergymen" (*Moggridge v. Thackwell*, Id. 517); "Poor inhabitants of St. Leonard" (*Attorney-General v. Clarke*, Amb. 422); "Poor dissenting ministers of the Gospel living \* \* \* in any of the counties" (*Waller v. Childs*, Id. 524); The creation of "a public sentiment that will put an end to negro slavery" (*Jackson v. Phillips*, 14 Allen, 539); "To the cause of Christ, for the benefit and promotion of true evangelical piety and religion" (*Going v. Emery*, 16 Pick. 107); "For the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Middlesex Union Association" (*Brown v. Kelsey*, 2 Cush. 243); "Educating some poor orphans for this county, to be selected by the county court" (*Moore's Heirs v. Moore's Devisees*, *supra*); and to buy bread for the poor of a church, and help in the education of young students (*Witman v. Lex*, 17 S. & R. [Pa.] 88).

The Massachusetts court in *Jackson v. Phillips* (*supra*) went even further and applied the *cy pres* doctrine, and distributed the bequests as near to the object of the testator as the court was able to determine — the conferring of which power upon the Supreme Court would seem to be the effect of the amendment of 1901 to the statute of 1893.

That the Court of Appeals recognizes the doctrine of the above cases as revived by the law of 1893, is illustrated by the remarks of CULLEN, Ch. J., in *Mount v. Tuttle* (183 N. Y. 358), which are as follows: "For example, we do not at present see why a legacy given by a citizen of this State, even to a foreign trustee in trust to distribute the principal or the annual income among poor clergymen in a foreign State, could not be upheld."

If the foregoing observations be correct, the only question that would remain respecting the will itself, would be whether, the beneficiaries being foreign to this State, our Supreme Court would administer the trust for their benefit.

There are remarks in *Chamberlain v. Chamberlain* (43 N. Y. 424) which would indicate that it would not do so. The observation in the opinion in that case is as follows: "The courts of this

State will not administer a foreign charity, but they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the State within which the charity is to be established to provide for its due administration and for the proper application of the legacy." As authority for the proposition thus enunciated, Hill on Trustees (468); 2 Story on Equity Jurisprudence (430); *Burbank v. Whitney* (24 Pick. 154); *Provost of Edinburgh v. Aubery* (Amb. 236) and *Attorney-General v. Lepine* (2 Swanst. 181) are cited.

It would seem, notwithstanding the broadness of the proposition quoted, that it has no application to the administration of a valid trust in this State, even though the object be a foreign beneficiary. Reference to the authorities cited for the proposition shows that Mr. Hill,\* when he laid it down, was treating of the formation of schemes for carrying out a charitable bequest in foreign territory. His precise language is as follows: "And where the trust is for a foreign charity, the court has no jurisdiction to direct a scheme, but will order the fund to be paid over to the trustees." In *Provost of Edinburgh v. Aubery* (*supra*) and in *Attorney-General v. Lepine* (*supra*) there were bequests for the establishment of charities in Scotland resting upon the discretion of persons named. The court simply decided that it would not formulate a scheme for carrying out the bequest in either case, but would transmit the money to the individuals in Scotland, so that they themselves might carry out the purposes of the testator. In *Burbank v. Whitney* (*supra*) specific sums were given to a bible and missionary society, both of which were unincorporated and located in the State of New York. The court held that it was merely the duty of the executor to pay over the moneys to such societies and let them expend it as they saw fit. In Story's Equity Jurisprudence (Vol. 2 [13th ed.], p. 517) the rule is stated as follows: "It has been made a question whether a court of equity sitting in one jurisdiction can execute any charitable bequests for foreign objects in another jurisdiction. The established doctrine seems to be in favor of executing such bequests. Of course this must be understood as subject to the implied exception that the objects of the charities are not against the public policy or laws of the State where they are sought to be enforced or put into execu-

\* See 4th Am. ed. p. \*468. — [REP.]

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tion; for no State is under any obligation to give effect to any acts of parties which contravene its own policy or laws."

In another portion of the opinion in *Chamberlain v. Chamberlain* (*supra*) it is said: "Bequests in aid of foreign charities, valid and legal in the place of their existence, will be supported by the courts of the State in which the bequests are made."

This latter case is very extensively quoted in *Hope v. Brewer* (136 N. Y. 126). The point at issue in both of these cases was whether the courts of this State would, upon the doctrines of comity, permit a foreign State to take a bequest made here, invalid by the laws of this State, although valid by the law of the State to which it was to be transmitted, and both decisions were to the effect that it was no concern of this State whether its statute laws were violated with respect to perpetuity or capacity to take if the law of the State of domicile of the legatee did not forbid. This is the extent of the doctrine as recently reiterated in *Robb v. Washington & Jefferson College* (185 N. Y. 485).

If the bequest under the will is valid, it would be strange indeed that the courts of this State should permit the bequest to fail because the beneficiary chanced to be domiciled in a foreign State. The testator was a resident of this State, and if he succeeded in making a will in conformity with its laws his wishes should be respected and his desires carried out. Nor is there any practical difficulty in so doing. The court can appoint a trustee, at least, to aid it in carrying out the provisions of the will, and the income can be transmitted to the treasurer of the Iowa College of Agriculture and Mechanic Arts, who can pay it over for the benefit of such students as the board designated by the testator shall select. It can be very easily determined whether the selection is properly made and the money properly applied. All that is necessary to be done is that the money shall be properly invested and the income transmitted and a report of its application made, with proper vouchers in support of the same. As much certainty can thus be had as would be the case had the testator appointed some resident trust company his trustee for that purpose.

If there had been no codicil, therefore, I cannot see that the will would have been invalid, or that the courts of this State would have refused to carry it into effect. The only difficulty which I labor

under is that the codicil, although invalid, shows such a clear intent on the part of the testator, which reflects upon his will, to give his property directly and absolutely to the Iowa State College of Agriculture and Mechanic Arts as to cast doubt upon his purpose to found scholarships for deserving students only. The college cannot take, and if the testator's intent was that it should take, the will must fail.

From this consideration only I am constrained to concur in the decision that the will is invalid.

Judgment ordered for plaintiff as indicated in opinion. Settle order on notice.

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JOHN WILLIAMS and ROBERT J. GERSTLE, Appellants, v. THE CITY OF NEW YORK, Respondent.

First Department, April 19, 1907.

**Municipal corporations — contract for improvement of hospitals in city of New York — bid in excess of appropriation not validated by subsequent additional appropriation.**

Under the provisions of the charter of Greater New York the Trustees of Bellevue and Allied Hospitals are without power to award a contract for additional buildings when all the bids are in excess of the amount appropriated therefor. Under such circumstances the board should reject the bids.

The fact that the trustees upon opening the bids announced the lowest bidder is not effective as an award of the contract either in law or in fact, nor does it give to the lowest bidder any right to compel the execution of a contract.

Nor does the action of said trustees resolving that the lowest bid be accepted subject to the approval of the board of estimate and apportionment and the board of aldermen of a request for an additional appropriation confer any rights upon the bidder. Such act of the trustees is *ultra vires*, they being without power to validate a bid in excess of the amount previously appropriated.

Such bid being invalid when made, cannot be given validity by any subsequent action by the trustees of the hospitals or by any other municipal board. Thus, a subsequent appropriation made by the board of estimate and apportionment and by the board of aldermen does not inure to the benefit of the prior bidder.

APPEAL by the plaintiffs, John Williams and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 5th

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day of July, 1905, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term.

*L. Laflin Kellogg* [*Alfred C. Petté* with him on the brief] of counsel [*Kellogg & Rose*, attorneys], for the appellants.

*Terence Farley* [*Theodore Connolly* with him on the brief] of counsel [*William B. Ellison, Corporation Counsel*, attorney], for the respondent.

CLARKE, J.:

The plaintiffs brought this action to recover damages for the refusal by the city to execute a contract claimed to have been duly awarded to them, said damages consisting of the profits they would have made if they had been allowed to perform.

By the provisions of section 692 of the revised charter of the city of New York (Laws of 1901, chap. 466) the care, management and control of Bellevue, Fordham, Harlem, Gouverneur and the Emergency hospitals were vested in a board of trustees known as the Board of Trustees of Bellevue and Allied Hospitals, and to said board was transferred the powers theretofore vested in the department of public charities of the city of New York, so far as concerned said hospitals. Subdivision 9 of said section provides that "The board of estimate and apportionment and the board of aldermen shall in each year appropriate such sum as in their judgment may be necessary for the support and maintenance of said hospitals."

In the summer of 1902 the board of estimate and apportionment duly passed a resolution, and the board of aldermen an ordinance, providing for an issue of corporate stock to an amount not exceeding \$39,000 for the purpose of providing means to pay for the construction of a dormitory in the medical college building for the employees of the Board of Trustees of Bellevue and Allied Hospitals. Thereafter the said board of trustees duly passed a resolution reciting the aforesaid action of the board of estimate and apportionment and authorizing the president of the board to prepare specifications and advertise for bids for the completion of this work.

Pursuant to this resolution a contract and specifications were prepared, and proposals for bids or estimates were asked, which

appeared in the newspapers of October 24, 1902. The proposed contract contained the resolutions of both the board of estimate and the board of trustees, and, therefore, the bidders were advised at the outset that the appropriation for the work for which their bids were invited was limited to the sum of \$39,000. On the 6th day of November, 1902, the bids were opened, there being nine bidders, and an announcement was made that the plaintiffs were the lowest bidders. All of the bids were greatly in excess of the appropriation. Plaintiffs' bid amounted to \$48,996. On November 7, 1902, as appears from the minutes of the board of trustees, the president reported the amounts of the various bids and a resolution was adopted which recited that the board had twice advertised for bids and that the lowest of the proposals received was largely in excess of the sum appropriated by the city for this purpose, and resolved: "That the board of estimate and apportionment and the board of aldermen be petitioned to approve and issue city corporate stock for \$14,000, the same being an additional appropriation for the purpose of converting the old medical college into a dormitory. Resolved, that the bid of Williams & Gerstle, 44th street and First Avenue, being the lowest of those received, be accepted, subject to the approval of the board of estimate and apportionment and the board of aldermen of the resolution requesting an additional appropriation of \$14,000."

On the 7th of November, 1902, the board of estimate and apportionment adopted a resolution authorizing an additional appropriation of \$14,000. Thereafter all of the other bidders were notified that their bids not having been the lowest, the security deposited by them would be returned and the amount of said deposit was returned to all the other bidders. On the twenty-first of November the secretary of the board of trustees wrote to the plaintiffs as follows: "The board of aldermen, having declined to approve the issue of additional corporate stock, upon which approval the acceptance of your proposal for work on the medical college building in Bellevue Hospital grounds was made conditional, I am directed to inform you that your proposal is hereby rejected, the present amount of the appropriation available for this purpose being insufficient;" and on the same day the board of trustees notified the comptroller that the security deposited by the plaintiffs should be

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returned. On the twenty-fourth day of November the security was returned to the plaintiffs by the comptroller. Thereafter the board of aldermen, on the twenty-fifth day of November, adopted an ordinance approving of the additional appropriation of \$14,000, which ordinance was approved by the mayor on December 2, 1902.

The plaintiffs claim that having been the lowest bidders, which fact was announced at the opening of the bids, they were entitled then and there to the award or all of the bids should then and there have been rejected; that inasmuch as all of the bids were not then and there rejected it must be held that they were awarded the contract; that the condition in the formal award made to them by the board of trustees, subject to the additional appropriation by the board of estimate and the board of aldermen, did not have the effect of invalidating the award; that there was no necessity that the entire sum should have been appropriated at the time of the opening of the bids; and that the subsequent appropriation of the additional amount related back and validated their bid.

In considering these claims it becomes necessary to review the provisions of the revised charter governing the letting of public contracts. Section 47 of the charter provides that, "The board of aldermen shall have power to provide by ordinance for \* \* \* constructing public buildings \* \* \* and \* \* \* may create loans and authorize the issue of bonds, or other evidences of indebtedness, to pay for the same, \* \* \*; but no bonds or other evidences of indebtedness shall be issued under the authority of this section unless the proposition for creating such debt shall first be approved by a majority vote of the whole board of estimate and apportionment, entered on the minutes of record of such board." The resolution authorizing this appropriation upon its face stated that it was passed pursuant to the provisions of section 47 (*supra*), and it was for the purpose of constructing a public building in conformity with said section and not otherwise, that the board of aldermen authorized the issue of the corporate stock. Section 419 of the charter provides that "All contracts to be made or let for work to be done or supplies to be furnished \* \* \* shall be made by the appropriate \* \* \* heads of departments under such regulations as shall be established by ordinance or resolution of the board of aldermen \* \* \* and all contracts shall be entered into by the appropriate \* \* \*

heads of departments and shall \* \* \* be founded on sealed bids or proposals made in compliance with public notices duly advertised \* \* \* ; if \* \* \* the head of a department shall not deem it for the interests of the city to reject all bids, he shall, without the consent or approval of any other department or officer of the city government, award the contract to the lowest bidder."

By section 692 of the charter (*supra*) we have seen that the Board of Trustees of Bellevue and Allied Hospitals, in regard to said hospitals, succeeded to all the rights, duties and powers theretofore vested in the department of public charities. Section 672 of the charter, governing the department of public charities, provided that "The commissioner, whenever the increase of inmates in or the proper care and government of the public institutions or establishments under his jurisdiction shall in his judgment render it necessary or expedient, shall have power, *provided an appropriation has been made therefor*, to enlarge or alter the buildings occupied by such institutions or establishments, or any of them, and to make all needful repairs to buildings and property under his control." Section 674 provides, " \* \* \* The commissioner shall incur no expense for any purpose in excess of the amount appropriated therefor \* \* \*."

Section 1541 of the charter provides that "No expense shall be incurred by any of the departments, boards or officers thereof, *unless an appropriation shall have been previously made covering such expense*, nor any expense in excess of the sum appropriated in accordance with law."

Section 1542 provides that "It shall be the duty of the heads of all departments and of all officers of said city and of all boards and officers charged with the duty of expending or incurring obligations payable out of the moneys raised by tax in said city, or any of the counties contained within its territorial limits, so to regulate such expenditures for any purpose or object that the same shall not in any one year exceed the amount appropriated by the board of estimate and apportionment for such purpose or object; and no charge, claim or liability shall exist or arise against said city \* \* \* for any sum in excess of the amount appropriated for the several purposes."

In the scheme of government of the city of New York, developed



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after years of experience and continued legislation, in consideration of the large number of boards, bureaus, officers and departments covering the diversified governmental interests of a great city, each with its special needs and constant demands for money, very great power has been lodged in the board of estimate and apportionment. It is the business of that board to receive from each of the administrative bodies, having charge of a particular branch of the city government, a statement of its needs and requirements, and upon considering the demands of all, to apportion to each that amount which, in the judgment of the board, is required. It has been the policy of the city to raise the money required for permanent improvements by the issuance of corporate stock rather than to pay for the same out of immediate taxation. For the issuance of the stock, action by the board of aldermen is necessary, based, however, upon a precedent resolution of the board of estimate and apportionment. It is so necessary to the proper management of this vast governmental machine that a central board should control the incurring of its financial obligations that the statutes again and again require that no expense shall be incurred unless an appropriation shall have been previously made covering such expense, and that no charge, claim or liability shall exist or arise for any sum in excess of the amount appropriated for the special purpose, and expressions of like import. If each department, if each board, if each officer, were at liberty to proceed according to his view of the necessities of his own peculiar work, the city would very speedily exceed its debt incurring capacity.

There is another section of the charter which illustrates the legislative intent to insure a precedent appropriation by the body charged with the control of the finances of the city before any of the administrative bodies can make a lawful contract. Section 149 provides that "No contract hereafter made, the expense of the execution of which is not by law or ordinance in whole or in part to be paid by assessments upon the property benefited, shall be binding or of any force unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract as certified by the officer making the same."

It follows, therefore, that when on the 6th day of November, 1902, the bids in the case at bar were opened, and it was discovered that the lowest of those bids was \$9,996 larger than the amount which had been appropriated for the doing of the work advertised for, it was the duty of the board of trustees having the matter in charge to have rejected all of said bids, because upon no one of them could a valid contract with the city have been entered into. The opening of the bids, the ascertainment of the lowest one thereof and the announcement of that fact did not constitute an award either in fact or in law; nor did the plaintiffs, as the lowest bidders, acquire, by either or any of those facts, any right to have a contract with them executed. If the bids had been within the appropriation previously authorized, the mere fact that they were announced to be the lowest bidders would have conferred upon them no such right, for even under those circumstances it would have been within the power of the board of trustees to have rejected all the bids.

Nor did the action of the board of trustees by its resolution adopted on the seventh day of November confer any rights upon these plaintiffs. It resolved that the bid of the plaintiffs, being the lowest of those received, be accepted subject to the approval of the board of estimate and apportionment and the board of aldermen of the resolution requesting an additional appropriation of \$14,000. This was *ultra vires* the board of trustees. Section 419 of the charter provides that if "the head of a department shall not deem it for the interests of the city to reject all bids, he shall, without the consent or approval of any other department or officer of the city government, award the contract to the lowest bidder." The board undertook to award this contract conditioned upon the consent or approval of two other boards, that of estimate and apportionment and the aldermen. This in itself was in violation of the positive provisions of the statute.

The board of trustees could not validate a bid in excess of the amount previously authorized. The bid was invalid when made and no subsequent action by that board or by any other board could breathe into it the breath of life. If the positive inhibition of the statute can be so evaded, if the city government should hereafter fall into the hands of careless or unscrupulous officials, an easy way

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would be provided for collusive bids under a small appropriation and a subsequent enlargement thereof in fraud of possible bidders and great loss to the city. The strict provisions of the Consolidation Act, re-enacted in the charter, were the outgrowth of the experiences of the city a little over a generation ago when its finances were unblushingly and almost openly looted by a conspiracy between public officials and their favored contractors. What has once happened may be repeated.

While in the case at bar there is no suggestion of fraud or impropriety, good motives in the particular case furnish no grounds for weakening the defenses against possible fraud. The conditional acceptance of the bid, therefore, conferred no rights upon the plaintiffs.

Before the additional appropriation, upon which the acceptance was conditioned, had been authorized, the board of trustees notified the plaintiffs that their bid had been rejected and upon that notification the plaintiffs received back the amount of their deposit from the comptroller. This was on the twenty-fourth of November. After the final rejection of the bid and the receipt of the deposit, the board of aldermen passed the ordinance authorizing the additional appropriation and it was approved by the mayor on the second day of December. Upon this record it is a fair inference that this action by the board of aldermen was purposely delayed until the final rejection of all the bids in order that there might be no apparent obstacle in the way of a readvertisement upon the increased appropriation with a fair opportunity to all bidders to avail themselves of the new conditions.

We think that if the board of trustees had not notified the plaintiffs of the final rejection of their bid and if they had not received back their deposit, still the approval of the ordinance would have had no effect upon this bid. Previous appropriation is essential to the validity of a contract for public work to be paid for by the public funds under the provisions of the charter.

The plaintiffs cite the cases of *Lynch v. Mayor* (2 App. Div. 213) and *Pennell v. Mayor* (17 id. 455). Those cases are authority for the proposition that when a bidder has been notified by the appropriate head of a department that his bid is the lowest and has been accepted and that a contract will be executed with him, his

rights are fixed and a contract has been made with him to execute a contract, and upon refusal to execute the formal contract he has a right of action to recover as damages for such breach the amount of profit he would have made if the contract had been executed and performed by him. Neither of them, however, is an authority for the proposition that the head of a department has the right to make an award conditioned upon the act of some other board; nor was there in either of them the question of the want of a previous appropriation. On the contrary, in both cases the appropriation had been made.

Plaintiffs further cite *Bradley v. Van Wyck* (65 App. Div. 293). In that case plaintiff, a taxpayer, brought an action to restrain the city authorities from accepting a bid. Among the objections the plaintiff raised was that the amount to be paid to the successful bidder was in excess of the appropriation for the work. This work was the erection of a public library building in Bryant park to be occupied by the New York Public Library, Astor, Lenox and Tilden foundations, and was authorized and provided for by chapter 556 of the Laws of 1897, as amended by chapter 627 of the Laws of 1900. In answer to this objection Mr. Justice INGRAHAM pointed out that it was without merit because there was no provision in the said statute requiring an appropriation to be made before the contract was executed. The provisions of law, therefore, governing that contract were not the general provisions of the Consolidation Act or of the charter, but were those contained in the special legislation authorizing the work, and the case has no application here.

The plaintiffs also cite *Van Dolsen v. Board of Education* (162 N. Y. 446), but in that case the plaintiff had actually performed under written contract with the board of school trustees of the fourth ward of the city of New York, acting for and on behalf of and for the benefit of the board of education. Section 1029 of the Consolidation Act (Laws of 1882, chap. 410) in force at the time, provided that no contract should be made by the school officers of any ward until an appropriation should have been made by the board of education. The answer admitted that when the contract was made the defendant had ample funds for the payment thereof, and that said funds had been duly set aside by the proper authorities of the city of New York for the use of the defendant, and that the defendant had spent all of these funds

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before the plaintiff demanded payment. The court said: "The defendant had the means and the discretionary power to make the appropriation and it directed the work to be done and the appropriation to lie over until the cost should be ascertained. The board of trustees knew that the appropriation had not been made, but the plaintiff did not know it. \* \* \* Defenses by official boards resting upon their omission to do the acts they had the power to do in order to perfect the authority they assumed to exercise, are not favored when invoked against innocent parties dealing with them in good faith." But in that case a written contract was entered into and the work was actually performed. In the case at bar no contract was entered into and no work was performed. In the *Van Dolsen* case the school trustees were the agents of the board of education, and with its approval made the contract, and at the time it was so made the board had funds sufficient to pay therefor, which they spent in other ways. The plaintiff had no knowledge and had no power to protect himself. He was an innocent party who had duly performed upon a written contract.

In the case at bar the plaintiffs come not within that category. The very contract upon which they bid contained the resolutions and ordinances which fixed the amount appropriated for the work at \$39,000, and they agreed in writing in their bid that they had examined the contract, and in the face of that notification and with that knowledge they made their bid for nearly \$10,000 in excess of the limit. The case cited does not apply.

It follows that the plaintiffs acquired no right to have the contract awarded to them; that the contract was not awarded to them; that they have no cause of action by reason of the refusal of the city to execute the contract with them. The judgment dismissing the complaint, therefore, should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES McKENNA, Appellant, Impleaded with JOHN MURRAY, Defendant.

First Department, April 19, 1907.

**Crime — robbery, first degree.**

Evidence given on the trial of an indictment for robbery in the first degree considered and judgment of conviction affirmed.

APPEAL by the defendant, Charles McKenna, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 5th day of January, 1906, convicting him of the crime of robbery in the first degree, and also from an order denying the defendant's motion for a new trial.

*Frank Moss* of counsel [*Isidor Wels*, attorney], for the appellant.

*E. Crosby Kindleberger* of counsel [*William Travers Jerome*, *District Attorney*], for the respondent.

CLARKE, J. :

The defendant was jointly indicted with one John Murray for the crime of robbery in the first degree in that they did with force and arms in and upon one Daniel Donohue feloniously make an assault and the sum of five dollars and fifty cents from the person of said Donohue against his will and by violence feloniously did rob, steal, take and carry away, being then and there aided by an accomplice actually present. The defendant had a separate trial. The complaining witness, Donohue, was the janitor of 501-507 West Twenty-ninth street.

Into the hallway of these premises there opened upon the one side the door of a saloon and upon the other the door of a club room. Before this occurrence Donohue had never seen either the defendant or Murray. About ten-thirty in the morning, as Donohue came out of the saloon into the hallway, shutting the door behind him, McKenna, Murray and two other men rushed out of the club room and made a violent and brutal assault upon him. McKenna caught him by the throat, hit him in the head, dug his hand into the lower left-hand pocket of his vest, in which there was five dollars and fifty cents, tearing the pocket, which had previously been in good condition; Murray at the same time catching him by

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the leg and pulling his feet from under him and the three men kicking him in the side and in the head so that he was rendered unconscious. This atrocious and unprovoked assault upon a perfect stranger by the defendant and his companions is not denied. Nor is there any question of identity involved.

Two of the men got away, but McKenna and Murray were arrested after a violent fight with the police in the immediate vicinity and shortly after the commission of the crime. The defendant did not take the stand and the only evidence offered on his behalf was that of the barkeeper, who testified that Donohue had had two more drinks that morning than he had himself testified to upon the stand, and of the defendant's employer, who testified that he had paid him fifteen dollars that morning.

Admitting the assault and its brutality and that a conviction therefor would have been proper, the learned counsel for the appellant urges that the crime of robbery was not proved beyond a reasonable doubt. Donohue testified positively that immediately prior to the occurrence he had five dollars and fifty cents in his lower left-hand vest pocket; that he had seen the amount there fifteen minutes before the occurrence and the pocket was not torn at that time; that McKenna had his hand in his pocket; that he certainly did see his hand go in his pocket.

His wife, Emily Donohue, testified that while her husband was still lying in the hallway and within ten or fifteen minutes after he was struck, while they were waiting for the ambulance, she examined his pockets and took from his other pocket certain keys and a pocket book; that she found this lower left side vest pocket torn, with nothing whatever in it, and, the vest being identified before the jury, she testified that the pocket was then in the torn condition, as it appeared before the jury.

The argument of counsel before the jury and before this court was that the money might, in the altercation, have fallen out of the pocket and if so a conviction of robbery was unwarranted. It is clear, however, when a body of men make a sudden, unprovoked and brutal assault upon an entire stranger who swears positively to the possession of a certain amount of money in a certain pocket in his clothes which was in good condition immediately prior to the assault, and when he swears that he saw the defendant put his hand

in his pocket, and when within ten minutes thereafter another witness swears to making an examination of the unconscious form of the person assaulted and finds the torn pocket and no money, that a state of facts is presented upon which the jury would be entitled to draw the conclusion that the assault was for the purpose of a robbery, and that that crime had actually been committed. The inferences to be drawn from proved facts are essentially within the province of the jury, and when having been properly and carefully charged as to the law they have found, upon the facts proved and the necessary inferences therefrom, the defendant to have been guilty beyond a reasonable doubt, this court, upon an argument based upon a suggestion as to what might have happened, the defendant not having produced any evidence in his own behalf as to the material issues involved, will not set aside the verdict of the triers of the facts as against the weight of evidence.

We have examined the record with care and we find nothing to criticise in the conduct of the district attorney or of the learned trial court. No errors were committed to the prejudice of the defendant. He was properly convicted of the crime whereof he stood indicted.

The judgment should, therefore, be affirmed.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed. \_\_\_\_\_

GEORGE S. BRADT, Respondent, v. JAMES McCLENAHAN, Appellant, Impleaded with ELIZA C. CLARK, Individually and as Administratrix with the Will Annexed of MICHAEL DARCY, Deceased, and Others, Respondents.

First Department, April 19, 1907.

**Real property — action to have deed declared to be a mortgage — judgment — court confined to decree in accordance with facts admitted by the parties.**

When in an action to determine the title to real property, both the plaintiffs and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt due the grantee, the court is



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without power to render judgment that the deed was void as champertous and because given while the property was in the adverse possession of another. The formal admissions in the pleadings bind the parties making them, and the court is confined to a determination of the fact that the deed was in fact a mortgage and to the ascertainment of the amount due thereon.

APPEAL by the defendant, James McClenahan, from a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 15th day of February, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, determining the title to certain real estate.

*Gratz Nathan* of counsel [*Thomas J. Farrell*, attorney], for the appellant.

*I. Newton Williams* of counsel [*Williams & Caldwell*, attorneys], for the plaintiff, respondent.

*Eugene Fay* of counsel [*R. & E. J. O'Gorman*, attorneys], for the respondents Abbott and others.

CLARKE, J. :

This action was brought for the sale of certain real estate alleged to have belonged to one Michael Darcy, deceased, and devised by him with other property, real and personal, to his wife, and after her death, to his children, and for the distribution of the proceeds thereof. The complaint alleges "that the record title to said property \* \* \* was taken in the name of defendant, Frank A. Clark, but said property was owned by and in the possession of the said Michael Darcy at the time of his death, and the said Frank A. Clark executed and delivered a deed of said property on or about the 12th day of June, 1894, to the defendant James McClenahan. It was understood at the time of the execution and delivery of said deed by said Clark to said McClenahan that the said deed was so given as security for a certain indebtedness owing by said Clark to said McClenahan, the amount of which this plaintiff is unable to ascertain \* \* \* and he will be unable to ascertain the amount thereof, but the said McClenahan admits that he holds the title of said real estate simply as collateral security for the moneys owing to him by the defendant, Frank A. Clark." The complaint further

alleges that the plaintiff has no adequate remedy at law and asks the equitable interposition of the court to ascertain the amount of the claim of said James McClenahan against said property, being the amount of indebtedness for which said property was conveyed by way of mortgage or security by defendant Clark; and for the decree of this court adjudging that the said property be sold and that the said McClenahan be paid the amount of his claim therein, and that the parties to this action receive their respective interests in the proceeds of the sale of said property, after paying the expenses of the suit and the claim of said defendant McClenahan against the same. In his demand for judgment the plaintiff asks, *second*, "that the deed of said premises now in the name of defendant James McClenahan, be adjudged to be a mortgage and that his mortgage or claim thereon be ascertained, the property sold under the direction of the court and his claim be paid."

Three of the defendants did not appear. The defendant Eliza C. Clark, individually and as administratrix with the will annexed of Michael Darcy, deceased, admitted all the allegations of the complaint and joined in the prayer for judgment. All of the other defendants, children and grandchildren, repeated the allegation of the complaint that this deed was a mortgage, and joined in the prayer for relief and demand for judgment that it be adjudged to be a mortgage and that the claim thereunder be ascertained and the property sold under the direction of the court and McClenahan's claim be paid.

The defendant Frank A. Clark did not deny any of the allegations in regard to this transaction, but denied that Darcy died seized and possessed of the premises in question. The defendant McClenahan alleged that at the time that Frank A. Clark transferred to him, he was, or pretended to be, the owner in fee simple of the premises and that Clark was then in the actual possession thereof, and that Clark agreed with him for the conveyance thereof as security for a then existing indebtedness of said Clark to the David Stevenson Brewing Company, of which the defendant was then and is now the president, and for security for such further indebtedness to said company as might thereafter be incurred by said Clark or by one Patrick Flanagan, or both.

The plaintiff and the defendants all thus agreed that McClenahan

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held a mortgage upon these premises and all asked that the amount of the indebtedness for which the mortgage was a lien or security be ascertained, and that the property be sold, and that out of the proceeds thereof the claim be paid. The learned trial court found as a conclusion of law that said paper, though intended only as a mortgage, was null and void, as it was given while the property was in the adverse possession of the life tenant under the last will and testament of Michael Darcy and the devisees under said will, and that the said paper was also void because the said property belonged to the estate of Michael Darcy, deceased, at the time said paper was delivered to the said McClenahan, and that the said paper was given for a contingent liability already created and existing at the time of its delivery. The judgment "ordered, adjudged and decreed that the defendant James McClenahan surrender to the clerk of this court the deed executed as and for a mortgage, delivered to him by the defendant Clark and wife, dated June 12th, 1894, and recorded on June 13th, 1894, at two o'clock and twenty-eight minutes P. M., in liber 26, Section 3 of Conveyances, at page 413, and that the said clerk destroy the same and that the Register of the County of New York mark opposite the said paper writing in section, liber and page aforesaid, 'This instrument cancelled and discharged of record by judgment of the Supreme Court entered February —, 1906. See judgment.'"

That is in direct opposition to the issue tendered by all the pleadings, and upon an issue not raised by any of the pleadings, the court has decided that the instrument, treated by all the pleadings as a valid mortgage, the only question being as to the amount due for which it was security, was champertous, absolutely null and void, and has decreed its destruction.

This judgment cannot be sustained. While the question of champerty was not presented by any of the pleadings, it is upon that question that the judgment was rendered and is now sought to be upheld. Clark took title from the referee at a foreclosure sale. He paid the purchase money and received the deed in his own name and recorded it. That made him the legal and record owner of the property. While thus the legal and record owner he conveyed by deed intended as a mortgage to McClenahan.

The evidence shows that McClenahan had no notice of the claim

of the Darcy heirs to this property; supposed that it belonged to Clark, had the title searched, and after discovering by said search that Clark was the record owner, received the instrument and duly recorded it. The complaint in effect stated that the Darcy heirs were the owners of the beneficial interest in this property, but that Clark had legal title and had made a valid mortgage thereon, that they wished the court to ascertain the amount which this mortgage was given to secure and decree the payment thereof out of the proceeds of the sale of the property. There was no question raised in the pleadings as to the validity of the mortgage on the ground of lack of consideration or for any other reason. Its validity was admitted by all parties.

These formal admissions in the pleadings bind the parties making them. Under them the court was confined to a determination of the fact that the instrument, upon its face a deed, was in fact a mortgage, and to the ascertainment of the amount due thereon.

The case having been decided upon matters not in issue, the appellant has not had his day in court. The judgment does not follow the pleadings, and should be reversed and a new trial granted, with costs to the appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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CHANDLER A. OAKES, Respondent, v. THOMAS B. RITER, Appellant,  
Impleaded with MURT K. SALSURY and Others, Defendants.

First Department, April 19, 1907.

**Deposition — when examination upon interrogatories matter of right.**

In the absence of bad faith the provision of section 889 of the Code of Civil Procedure requiring the issuance of a commission upon interrogatories is mandatory. All that is necessary to show upon a motion for such commission is that the action is one mentioned under section 888 of the Code of Civil Procedure and that the testimony of one or more witnesses not within the State is material to the applicant.

The commission may in a proper case issue to examine a party as well as a witness.

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APPEAL by the defendant, Thomas B. Riter, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of March, 1907, denying said defendant's motion for the issuance of a commission to take his testimony upon written interrogatories.

*William M. Bennett* of counsel [*McElheny & Bennett*, attorneys], for the appellant.

*Albert I. Sire*, attorney, for the respondent.

CLARKE, J.:

The defendant Riter is a non-resident of the State of New York and is now without the State, being in the city of Pittsburg, Pa., where he resides. An issue of fact has been joined and the testimony of the defendant is material. Said defendant applied to the Special Term for an order for the issuance of a commission for the purpose of taking his testimony to be used upon the trial upon written interrogatories.

The moving papers set up the necessary facts as prescribed by sections 887 and 888 of the Code of Civil Procedure, and, in addition thereto, that said Riter was seriously ill and confined to his bed in the city of Pittsburg.

Section 887 provides that "In a case specified in the next section, where it appears by affidavit on the application of either party that the testimony of one or more witnesses not within the State is material to the applicant, a commission may be issued \* \* \*. The applicant or any other party to the action may be thus examined." Section 888 provides that "Such a commission may be issued \* \* \* 5. Where an issue of fact has been joined in an action pending in a court of record and the testimony is material to the applicant in the prosecution or defense thereof." Section 889 provides that "An order \* \* \* must be granted upon satisfactory proof of the facts authorizing it unless the court or judge has reason to believe that the application is not made in good faith or unless an order for an open commission or for taking depositions is made as prescribed in this article\*."

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\* Code Civ. Proc. chap. 9, tit. 3, art. 2. — [REP.]

There is nothing in these papers furnishing a reason to believe that the application is not made in good faith. In the absence of bad faith the provision is mandatory. All that is necessary to appear to justify the granting of the motion for a commission is that the action should be one mentioned under section 888, and that the testimony of one or more witnesses not within the State is material to the applicant. (*Laidlaw v. Stimson*, 67 App. Div. 545.)

"A commission may, in a proper case, issue to examine a party as well as a witness upon interrogatories pursuant to the provisions of section 887 of the Code of Civil Procedure." (*Ordway v. Radigan*, 114 App. Div. 538.)

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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EDMUND WRIGHT, as Trustee in Bankruptcy of MICHAEL SAMPTER and ARNOLD SAMPTER, Individually and as Copartners, Doing Business under the Firm Name of M. SAMPTER, SONS & COMPANY, Respondent, v. JENNIE SIMON and Others, Appellants.

First Department, April 12, 1907.

**Pleading — allegation that various transactions were done pursuant to scheme to defraud creditors.**

A series of acts involving different conveyances and fraudulent judgments made to different parties, at different times, can properly be the subject of one bill in equity by creditors to reach the property, provided it be alleged that the acts were done pursuant to a single and forbidden scheme.

A complaint which sets out that such transactions were made without consideration and with a continuing intent to cheat and defraud creditors is not subject to demurrer.

APPEAL by the defendants, Jennie Simon and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff,

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entered in the office of the clerk of the county of New York on the 11th day of December, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendants' demurrers to the plaintiff's complaint.

*Leo Oppenheimer*, for the appellants.

*Max J. Kohler*, for the appellant Virginia Sampter.

*Abram I. Elkus*, for the respondent.

LAMBERT, J. :

The courts of this State have time and time again expressed the view that a series of acts involving different conveyances and fraudulent judgments made to different parties at different times could properly be the subject of one bill in equity to reach the property for creditors, provided only it was alleged that the same was done pursuant to a single and forbidden scheme. It is alleged that the several transactions were made without consideration and with a continuing intent to cheat and defraud creditors. (*Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Wood v. Sidney S., B. & F. Co.*, 92 Hun, 22; *Porter v. International Bridge Co.*, 163 N. Y. 79.) As a pleading simply we hold it to be good.

The judgment is affirmed, with costs, with leave to defendants to withdraw demurrers and to answer within twenty days, upon payment of costs in this court and in the court below.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and SCOTT, JJ., concurred.

Judgment affirmed, with costs, with leave to defendants to withdraw demurrers and to answer on payment of costs in this court and in the court below.

THOMAS A. McINTYRE, Appellant, v. ELMER E. SMATHERS,  
Respondent.

First Department, April 12, 1907.

**Pleading — complaint stating action for conversion — counterclaim on  
contract demurrable.**

A complaint which alleges the title to personal property in the plaintiff under a promise by the defendant to deliver it upon demand, that demand was made and refused, states an action for conversion and a counterclaim thereto founded upon contract is subject to demurrer.

APPEAL by the plaintiff, Thomas A. McIntyre, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of January, 1907, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the plaintiff's demurrer to a counterclaim set up in the defendant's answer.

The defendant sets up a counterclaim founded upon contract.

*Maurice Léon*, for the appellant.

*John M. Stearns*, for the respondent.

LAMBERT, J.:

If the complaint sets out an action on contract then the counterclaim may be litigated in this action under subdivision 2 of section 501 of the Code. If, on the contrary, it is in tort the judgment must be reversed. The complaint alleges the title to the personal property in the plaintiff under a promise by defendant to deliver it upon demand. Demand was made and refused. It is clearly a case where possession by the defendant until demand made was rightful, but the detention after demand is wrongful, and it amounted to a conversion at the election of the plaintiff. The title to the personal property in question is placed in the plaintiff by the allegations of the complaint, with the right of possession upon demand. It must be apparent that a refusal to surrender possession as an incident to the title constituted conversion.



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The interlocutory judgment should be reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend within twenty days after entry of order and payment of costs.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and SCOTT, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend on payment of costs in this court and in the court below.

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ARTHUR H. WADICK, Appellant, v. MALINDA G. MACE, Respondent.

First Department, April 19, 1907.

**Vendor and purchaser — contract sufficient to warrant specific performance — when vendee entitled thereto — equitable powers of court.**

Requirements of a contract to sell lands sufficient to authorize decree of specific performance stated.

Although the fact that a title tendered may impose a law suit upon the vendee to establish the boundaries is not an incumbrance in a legal sense, the tender of such deed is not a compliance with a contract of sale requiring a "proper deed" assuring the grantee a fee simple free from all incumbrances.

A contract to give a "proper deed" calls for a marketable title, which is defined as one free from reasonable doubt, and a title which must be defended by litigation is not free from doubt.

When a vendor has agreed to convey by proper deed a title in fee simple free from all incumbrances by specific metes and bounds and it develops that by the bounds described access to other property of the vendor would be cut off, the vendee does not thereby lose his right to specific performance and is not in default by reason of a refusal to accept a deed which fails to set out the boundaries agreed upon.

*It seems*, that under such circumstances a court of equity in the exercise of its discretion may not compel the execution of a deed which will cut off the grantor from access to other lands, but may order a reference to determine an equitable performance of the contract which will be fair to both parties.

APPEAL by the plaintiff, Arthur H. Wadick, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of July, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

Arthur H. Wadick, the plaintiff, appeals from a judgment in favor of the defendant, Malinda G. Mace, in an action for the specific performance of a contract. The material parts of the contract are here set out :

" Agreement made the 26th day of January, 1905, between Malinda G. Mace, \* \* \* party of the first part, and Arthur H. Wadick, \* \* \* party of the second part, in manner following : The said party of the first part, in consideration of the sum of \$115,000, to be fully paid as hereinafter mentioned, hereby agrees to sell unto the said party of the second part all that certain tract of land situate, lying and being in what was formerly the town of Westchester \* \* \* but now a part of the Twenty-fourth Ward, Borough of the Bronx \* \* \* and known as the most southerly twenty (20) acres of the Levi H. Mace Farm, nearest Bronxdale, and running from the White Plains Road to Boston Road and bounded and described as follows : Northerly by the remaining portion of the said Levi H. Mace Farm ; easterly by the Boston Road ; southerly by the Wolff Estate, and westerly by the White Plains Road.

" And the said party of the second part hereby agrees to purchase said premises at the said consideration of \$115,000, and to pay the same as follows : \$1,000 upon the signing of the within contract, the receipt whereof is hereby acknowledged ; \$27,750 in cash upon the closing of title and delivery of deed. The balance of \$86,250 to be secured by a purchase-money mortgage upon said premises to bear interest at the rate of five (5) per centum per annum, payable semi-annually, and to run for a term of five (5) years."

It was further provided that if the party of the second part made default, that then the contract ceased, and the deposit of \$1,000 should be retained by the party of the first part as and for liquidated damages, and no suit should be maintained for specific performance or damages, and " the said party of the first part, on receiving such payment of \$115,000, at the time and in the manner above mentioned, shall at her own proper costs and expenses, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the said party of the second part, or to his assigns, a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to him or them the fee simple of the said premises, free from all encumbrance, except any

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tax or assessment becoming a lien after the date of this agreement, \* \* \* which deed shall be delivered on or before the 27th day of March, 1905, at twelve o'clock, noon, at the office of Arthur H. Wadick."

On the 4th day of March, 1905, the party of the second part paid to the party of the first part \$500 for an extension of thirty days. After the delivery of the contract, the party of the first part agreed to have made a survey of the twenty acres, so as to locate the same by a definite boundary. That was never done. After much delay the party of the first part tendered to the plaintiff a deed containing the identical description set out in the contract. This was refused by the party of the second part.

This action was then brought, and upon the trial the court dismissed the complaint upon the merits. From the judgment thereupon entered, the plaintiff appeals to this court.

*Ernest Hall*, for the appellant.

*Ralph Hickox*, for the respondent.

LAMBERT, J. :

The contract in question meets all the requirements which the courts have laid down for the exercise of equitable power of enforcing specific performance. These requirements are summarized by Mr. Pomeroy in his work on Equity Jurisprudence (3d ed., § 1405), as follows: "It (the contract) must be upon a valuable consideration. It must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be, in general, mutual in its obligation and in its remedy. The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake or illegality. \* \* \* The contract must be perfectly fair, equal and just in its terms and in its circumstances. The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive. The vendor's title must be free from reasonable doubt."

The defendant does not suggest that the contract is lacking in any of these elements. It certainly is upon a valuable consideration, for the plaintiff paid \$1,000 upon the making and delivery of the con-

tract, and subsequently paid \$500 to secure an extension of the time of performance. It is certain as to its subject-matter. It is mutual in its requirements and its remedies. The obligation on the part of the defendant is to deliver "a proper deed" upon the payment of the sums agreed upon and the execution and delivery of a purchase-money mortgage, and the obligation of the plaintiff is to make such payments and to accept "a proper deed," or in default of such performance, to forfeit the payment of \$1,000 which he made upon the delivery of the contract. It is true that the plaintiff has a right of action for specific performance, and that the defendant has waived her corresponding right by stipulation, but in lieu thereof there was secured to her \$1,000 for an option on the premises for a limited time. On the default of the plaintiff, she was entitled to retain the \$1,000, and end her obligation under the contract. On the default of the defendant, the plaintiff was left to his remedies in the courts. Plainly stated, then, we have a contract for "the most southerly twenty (20) acres of the Levi H. Mace Farm," at a given price per acre aggregating \$115,000. No one intimates that there was any mistake about this, though it developed upon the trial of the action that when the defendant came to make an investigation, it was found that the "most southerly twenty (20) acres of the Levi H. Mace Farm" carried the northern boundary over a certain highway known as Bleeker street or Allerton avenue, and that this would operate to cut the defendant's remaining property off from the highway for a considerable distance. But the defendant knew of this highway; she had been paid by the city of New York for the very premises involved in the change of this highway several years before, and the roadway was in course of construction at the time the contract was executed. There is nothing to show that the plaintiff knew of this situation more than the defendant, and while it is probably true that the parties at the time of making the contract did not contemplate the result as later disclosed, there is no valid reason, even if that be true, why the plaintiff should be denied the benefits of his contract as to all of this property, which has concededly increased in value since he assumed the risks of the purchase. The result of the judgment, as it now stands, is to permit the defendant to violate the obligation of her contract to the detriment of the plaintiff, who has been and still is ready to perform his part of the

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agreement. In fairness and in equity, the plaintiff has a right to the benefits of his contract. He paid \$1,000 down, and subsequently paid \$500 for the privilege of having the time extended, and if he had not been prepared to perform his contract within a reasonable time, he would, by the terms of his agreement, have forfeited the deposit of \$1,000, and it may be of the \$500, while if the defendant is called upon to specifically perform her contract, she will only be accepting the amount of money which she agreed was a fair price for the twenty acres involved in the transaction.

It developed upon the trial that the defendant, after discovering the fact that the northerly boundary would carry the line north of the highway, put off the time of closing title, and finally tendered the plaintiff a deed in the language of the agreement, which failed to define the northern boundary; and this is made the basis of the decision adverse to the plaintiff by the learned court at Special Term. The opinion says that "under the circumstances presented, the defendant performed her whole duty in tendering to the plaintiff a deed in accordance with the terms of their contract. Upon his failure to perform upon his part, she was entitled to terminate their relations." It seems to us that this completely ignores the rights of the plaintiff. The deed, in the language of the contract, was not "in accordance with the terms of their contract," for the terms of their contract required that the defendant should deliver to the plaintiff or his assigns "a proper deed \* \* \* for the conveying and assuring to him or them the fee simple of the said premises, free from all encumbrance." Counsel for respondent, in his brief, concedes that the deed tendered would have to depend upon judicial construction to identify the premises conveyed. Certainly such a deed was not what the parties had in mind in the use of this language. The respondent's brief, after practically conceding that the purpose of the defendant was to back out of her contract when she found that the premises would reach north of the highway, says: "It did not seem to defendant's attorney that plaintiff was entitled to an election as to what he would take, and plaintiff was tendered a deed in the language of the agreement, accepting which he might have a judicial construction of the description, or if he was unwilling or unable to take up his option, he might receive back his money and the matter be ended. \* \* \* On the other

hand, this solution was apparently fair to defendant, no change in values having taken place, and a judicial construction of the description presumably protecting defendant's rights." But why, if the plaintiff was unable or unwilling to take up his option, should he receive his money back? His contract provided, if he failed to perform, that this money should be forfeited to the defendant, but the latter actually sent him a check for the advances made, which was returned to the sender, and this court is asked to sanction the doctrine that the tender of a deed which concededly imposed the burden of a law suit upon the plaintiff to establish his right was the tender of "a proper deed \* \* \* for the conveying and assuring to him or them the fee simple of the said premises, free from all encumbrance." While it is probably true that the entailing of an action in the courts would not be an incumbrance in a strict legal sense, it would, nevertheless, be a decided disadvantage, and a deed involving such a result would not constitute "a proper deed." The fair construction of the language is that the defendant will give "a proper deed," and thereby convey a marketable title, and this has been judicially defined to be "one that is free from reasonable doubt." There is reasonable doubt when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt, of course, must be such as to affect the value of the land, or will interfere with its sale. A purchaser is not to be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no fault or doubt will arise to disturb its market value. (*Vought v. Williams*, 120 N. Y. 253, 257.) A deed in the language of the contract is not such a deed as the plaintiff contracted for, and the defendant, never having been ready and willing to tender "a proper deed," the plaintiff could not be in default, even though, as urged by the respondent, he did not have the necessary funds on the day when the transaction was to be closed. The obligation of the plaintiff to make further payments was contingent upon the defendant's being able and willing to tender a proper deed, and until that was done the plaintiff could not be in default. (*Glenn v. Rossler*, 156 N. Y. 161.) Apart from the legal conclusion that the plaintiff was not in default, it is apparent that

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the defendant did not consider him in default, and that is evidenced by the effort to refund his money when, under the terms of his contract, the money belonged to her if the plaintiff neglected or refused to perform his part of the contract. In this view of the case, it is not important to consider whether the defendant did or did not agree to furnish a survey. She never tendered a proper deed of the premises which the plaintiff contracted to purchase and she to sell, and whatever right she may have had to a reformation of the contract, upon the ground of mistake as to the effect of the sale of the most southerly twenty acres of the farm, she has no right to deprive the plaintiff of all the benefits of his investment and his foresight in purchasing the property. It may be, in the exercise of sound discretion, that the trial court upon a retrial will not compel execution of the contract by directing a conveyance which will include a strip of land north of Bleeker street, for the obvious reason that the parties did not have that in contemplation at the time of making the contract of sale. They no doubt acted upon the assumption that a conveyance of the southerly twenty acres would carry the northerly line to the southerly boundary of Bleeker street or some point south of it. This is matter to appear by the conduct of the parties. Upon a discovery that a conveyance of the twenty acres would extend the line about fifteen feet north of Bleeker street, the vendor refused to convey by definite boundaries, and the vendee offered to take a conveyance which would locate the line on the southerly line of Bleeker street and take compensatory land at some other point. It is the highest function of equity to carry into effect the intention of parties, where it can be done upon terms of equality. Support for such a determination as above indicated is also found in the well-settled principle of equity, that specific performance will not be decreed where its effect will be harsh, oppressive or damaging to one far beyond the benefits conferred upon another. In this case it is apparent that the deprivation of street frontage to the remaining land of the vendor would impose injury and damage incalculably in excess of benefits to be derived by the vendee. It may be assumed as a fact resulting from the situation that a strip about fifteen feet wide north of Bleeker street would not be of any value to the vendee, while its loss to the vendor would destroy the market value of lands lying north of it.

These considerations are for the initial court. Upon the trial had the court held that a tender of a deed in the language of the contract was a tender of performance by the vendor, and its refusal by the vendee operated to discharge the obligations of the parties to the contract. By this decision and the judgment following it the defendant was given affirmative relief upon her contract obligations upon mere denial of some of the incidental allegations of the complaint, and as to all of which, so far as they are material, the evidence supports the contention of the plaintiff. This she is clearly not entitled to; she owes the plaintiff some duties under her contract, no part of which she has in good faith performed.

Upon the pleadings and proof taken, the plaintiff is entitled to some substantial measure of relief, and the case is returned to the court of equity, where the parties may be heard upon the equities. The questions under discussion have been sufficiently raised by exceptions, and the conclusion is reached that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event. If the wisdom of the trial court so suggests, the English rule, approved in *Phillips v. Thompson* (1 Johns. Ch. 131, 150), of appointing a referee to work out and report a scheme of equitable performance of the contract, may be adopted.

PATTERSON, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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VERYL PRESTON, Appellant, v. ÆTNA INSURANCE COMPANY,  
Respondent.

First Department, April 5, 1907.

**Insurance — fire insurance on motor vehicle — contract construed.**

Under a policy of fire insurance upon an automobile indemnifying against damage by fire, except damage "caused by fire originating within the vehicle," the insured is entitled to indemnity for a loss caused by the ignition of gasoline liberated by the overturning of the vehicle, which ignition was caused by a



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lighted lamp attached to the exterior of the vehicle. Such fire does not originate within the vehicle within the meaning of the policy.

If a provision of a policy is susceptible of two constructions, so that reasonable men would differ as to its meaning, that construction most favorable to the insured will be adopted, especially where the liability of the insurance company is general and a fire is sought to be brought within an exception to the general liability.

CLARKE, J., dissented.

APPEAL by the plaintiff, Veryl Preston, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 29th day of November, 1905, upon the report of a referee, dismissing the complaint upon the merits.

*Graham Sumner*, for the appellant.

*Ernest A. Cardozo*, for the respondent.

INGRAHAM, J. :

The plaintiff was the owner of an automobile valued at \$16,000, on which the defendant issued a policy of insurance by which the plaintiff was insured for one year, from the 10th day of October, 1901, "against all direct loss or damage by fire, except as hereinafter provided to an amount not exceeding Sixty-five hundred dollars," providing that "It is understood and agreed that this policy does not cover loss or damage caused by fire originating within the vehicle." The referee found the issuing of the policy; that the plaintiff was the owner of the automobile; that on the night of July 26, 1902, this automobile in charge of the plaintiff's chauffeur while going from Pleasure Bay to Monmouth, N. J., ran off the road which it was traversing into a ditch at the side of the road; that after the accident the automobile lay partly in the ditch; that the automobile carried two kerosene lamps on either side of the dashboard, attached to projecting iron or steel brackets, a socket in the lamp fitting over the bracket and the lamp being made fast by means of a bolt and nut, tightening a clamp, one lamp being about two inches above the water; that both of these lamps were lighted at the time of the accident; that the automobile was driven by gasoline vapor which was carried in a tank under the forward seat of the automobile; that after the accident the gasoline could be

heard dripping on the water in the ditch, and the smell of gasoline vapor was distinguishable; that shortly after the accident a dull sound was heard and a column of smoke rose from the automobile, from which flames broke; that the chauffeur, who was left in charge of the automobile, was found on the ground across the ditch and beyond a barbed wire fence on the further side, his clothes torn, his arm bare and his arm and both hands burned, and the gasoline on the water about the automobile was found in flames. One of the persons in the automobile at the time of the accident testified that "on the way back from Little Silver to Pleasure Bay, Raoul (the chauffeur) went off the road and into the ditch. \* \* \* The machine came to a standstill at an angle \* \* \* of about forty degrees;" that before he left the automobile he noticed that gasoline was escaping from the automobile; that he started for assistance, and when he came back the automobile was blazing; that the fire lasted a half or three-quarters of an hour; that from the time the witness left the automobile until his return was about fifteen minutes; that when he returned the chauffeur was in a lot across the ditch, his hands were burned, but was able to walk. Wilson, another of the persons in this automobile, testified that there was a big searchlight that was not lighted, and there were two other lights on the side that were lighted; that after the automobile stopped and was still in the ditch one of the side lamps was burning; that the witness started to get some horses to pull the automobile out of the ditch; that he got about a couple of hundred feet from the automobile when he heard something go off, and he looked back and the whole place was on fire; that no one struck a match near the machine that he saw. Stone, another person in the machine at the time, testified that after the accident he went to get a team of horses; that he saw that the two oil lamps on the side of the dashboard were burning; that he also smelled gasoline; that the water was about two and one-half inches below the base of the lamp on the right-hand side, and that the lamp was burning; that when he left with Newhouse the chauffeur was fussing around the right-hand lamp, the one near the water; that the witness and Newhouse then walked away about 100 feet, when they heard a muffled sound and turned and saw a black cloud and then flames followed, the automobile was in flames; that when the witness came back to the automobile the lights were out.

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Assuming that this fire was communicated from the light in one of the lamps to the gasoline on the water, the only cause of the fire which is apparent, the question is whether the fire that was communicated from the lamps to the gasoline on the water was a fire "originating within the vehicle." I think it was not. The motive power of these vehicles is the gas generated by the combustion of gasoline vapor in a chamber inside the vehicle. The gasoline tank is under the front seat and the machinery in front of the front seat. While it might be said that the lamps and other appliances on the outside of the vehicle, and which are affixed to it, would be a part of the vehicle, certainly none of them are inside the vehicle, and not, therefore, within the vehicle. Using this highly inflammable substance, gasoline, exploded by electric sparks, exposed the machine to danger of the gasoline in the tank exploding and setting fire to the vehicle, and for such a fire the defendant was not to be liable, as such a fire would undoubtedly originate within the machine; but the lamp was not within the vehicle, but was outside it, nor was the gasoline that ignited, and from which the fire originated, within the vehicle. If the gasoline had not escaped from within the vehicle, it is quite evident that there would have been no fire. The defendant was responsible for any damage caused to the machine by reason of the burning of the gasoline, whether it was in the tank or had leaked from the tank, provided the fire did not originate within the vehicle. I suppose there would have been no doubt that if the gasoline on the water in consequence of this accident had been ignited by a match or other light disconnected with the machine the defendant would have been liable, and the fact that the fire was communicated to the gasoline by a lamp screwed on to the outside of the vehicle did not make it a fire originating within the vehicle. It is settled that if a provision in a policy is susceptible of two constructions, so that reasonable men on reading the contract would differ as to its meaning, that construction will be adopted which is most favorable to the insured (*Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307; *Michael v. Prussian Nat. Ins. Co.*, 171 id. 25), and this rule is particularly applicable where the liability of the insurance company is general and a fire is sought to be brought within an exception to the general liability to discharge the insurer. In such a case "effect should

be given to any clause exempting him from liability only where the case falls clearly within the exception, and that the doubt should be resolved against the company." (*Devitt v. Providence Washington Ins. Co.*, 61 App. Div. 390; *affd.*, 173 N. Y. 17. See, also, *Griffey v. N. Y. Cent. Ins. Co.*, 100 id. 417; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452.)

It seems to me, therefore, that this fire was not within the exception, and that the plaintiff was entitled to recover.

It follows that the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., LAUGHLIN and SCOTT, JJ., concurred; CLARKE, J., dissented.

Judgment reversed, new trial ordered before another referee, costs to appellant to abide event. Settle order on notice.

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VERYL PRESTON, Appellant, v. UNION ASSURANCE SOCIETY,  
Respondent.

First Department, April 5, 1907.

**Insurance — fire insurance on motor vehicle — contract construed.**

Under a policy of fire insurance upon an automobile, providing that the insurer is not liable for fire "originating in the automobile itself," the insured may recover damages caused by gasoline liberated by an accident and ignited by a lamp attached to the exterior of the vehicle.

CLARKE, J., dissented.

APPEAL by the plaintiff, Veryl Preston, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of November, 1905, upon the report of a referee, dismissing the complaint upon the merits.

*Graham Sumner*, for the appellant.

*Charles D. Cleveland*, for the respondent.

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INGRAHAM, J. :

The same question is presented in this case as in *Preston v. Aetna Ins. Co.* (118 App. Div. 784,) decided herewith. There is a slight difference in the form of the exception, which in this case is as follows : " It is a condition of this policy that this company is not liable for any loss or damage to an automobile, any of its parts or its contents insured under this policy caused by fire originating in the automobile itself." It seems to me that the reasonable construction of this clause as in the *Aetna Ins. Co.* case is that the exception is to relate to a fire the exciting cause of which proceeds from the vehicle itself, and not from the outside. That this was the construction that the insurance company itself gave to this policy is shown by the fact that the assured warranted that the filling of the reservoir of an automobile was to take place by daylight only ; for, if the exception covered a fire caused in consequence of the ignition of this gasoline in any other way, except in the interior of the machine, such a warranty would have been quite unnecessary. It follows that the judgment appealed from is reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., LAUGHLIN and SCOTT, JJ., concurred ; CLARKE, J., dissented.

Judgment reversed, new trial ordered before another referee, costs to appellant to abide event. Settle order on notice.

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GEORGE G. DEWSNAP, Respondent, v. MOSES MATTHEWS and MOSES VALENSTEIN, Appellants.

IRVING BACHRACH and ISAAC SCHMEIDLER, Appellants.

First Department, April 19, 1907.

**Practice — order resettled to show moving parties.**

When a motion is made to vacate an order appointing a receiver in an action of foreclosure and asking that the moving parties be brought in to defend, the order denying the application should state that the motion was made on behalf of the moving parties, and should be resettled to show that fact.

APPEAL by the defendants, Moses Matthews and another, and by Irving Bachrach and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of January, 1907, denying the appellants' motion to resettle a prior order so as to show that the motion which it denied was made on behalf of the defendants Matthews and Valenstein, and also on behalf of Irving Bachrach and Isaac Schneidler.

*Paul Gross*, attorney [*Herman Kahn* on the brief], for the appellants.

*Alfred T. Davison*, for the respondent.

INGRAHAM, J. :

This action was to foreclose a mortgage. Before the defendants appeared the plaintiff obtained an *ex parte* order appointing a receiver of the mortgaged premises.

On the 24th of December, 1906, an order was obtained requiring the plaintiff to show cause why the order appointing the receiver should not be vacated and why Bachrach and Schneidler should not be made parties defendant and a supplemental summons issued, and why the defendants and Bachrach and Schneidler should not have such other and further relief as to the court might seem just and proper in the circumstances.

The affidavit upon which the motion was made was that of Bachrach, from which it appeared that the property had been conveyed by the defendants and mortgagors to Bachrach and Schneidler and the deed recorded before the action was commenced and notice of the pendency of the action filed.

It is quite evident from the order to show cause and the affidavit upon which the motion was made that the owners of the property were the moving parties and that they asked to be made parties to the action to protect the property of which they were the owners. The affidavit of Bachrach expressly states that he had fairly stated the case to Paul Gross, his attorney, and that the deponent had a good and substantial defense upon the merits to the cause of action set forth in the complaint; that he desires that he and Schneidler be made parties to the action and that they be given an opportunity to defend the action; "Wherefore deponent prays on behalf of

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himself and said Isaac Schmeidler that an order be made herein directing that deponent and said Isaac Schmeidler be made parties defendant herein."

The only answer to this is that the representative of the attorney who made the motion stated to the court that he appeared for the defendants. Where a fact that the moving party asks to have recited in an order of Special Term appears upon the record, the order should recite it and when an application therefor is denied a substantial right is affected which justifies an appeal to this court.

The order appealed from should be reversed and the case remitted to the Special Term to resettle the order as requested, with ten dollars costs and disbursements.

PATTERSON, P. J., CLARKE, HOUGHTON and LAMBERT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and case remitted to Special Term as stated in opinion. Settle order on notice.

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FRAZER & HAUGHTON, LIMITED, Appellant, v. MARY A. MOTT,  
Respondent.

First Department, April 19, 1907.

**Sale — error to dismiss the complaint because goods sold to defendant were shipped to third party.**

It is error to dismiss a complaint to recover the value of goods sold and delivered when there is evidence that it was agreed that the goods were to be charged to the defendant but billed and shipped to a third party.

Bills, receipts and instruments of like character are always open to explanation, and are not conclusive upon any of the parties.

APPEAL by the plaintiff, Frazer & Haughton, Limited, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of January, 1906, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*Louis S. Posner*, for the appellant.

*Frank G. Wild*, for the respondent.

INGRAHAM, J. :

The action is for goods sold and delivered, the complaint alleging that on the 7th of November, 1900, at Belfast, Ireland, the plaintiff sold and delivered to the defendant at her request certain goods, wares and merchandise set forth in a schedule annexed to the complaint at an agreed price, for which judgment was demanded. The answer in substance was a general denial. Upon the trial the court dismissed the complaint.

It appeared from the evidence that the defendant, together with a Mr. Crane and a Mr. Case, visited the warehouse of the plaintiff at Belfast, Ireland, taking with them a letter of introduction. The defendant asked the president of the plaintiff corporation whether she could buy some linen, to which he replied that he would be glad to accommodate her. The defendant then purchased some goods. Mr. Crane then asked the defendant whether he could buy some goods, to which she replied certainly, and said that the goods Mr. Crane purchased should be charged to her. The defendant and Crane then gave instructions as to marking the linen purchased and Case also bought some goods. It was then suggested to bill the goods to Case, to which he objected because he expected to return before the others. It was then agreed that the goods should be billed and shipped in Crane's name ; that Mrs. Mott, the defendant, should pay for them. The plaintiff's president then asked to whom he should make out the bill and the defendant said it " was her charge ; it was to be charged to her," but to bill and ship them in Crane's name, to which the plaintiff's president replied " very well." There was also evidence that the defendant had received the goods that she had purchased for herself and had used them, and also evidence that she had given Mr. Crane money to pay the bill, but that he had failed to do so.

I think there was evidence to sustain a sale of the goods to the defendant, at least as to the goods ordered specially by her. She ordered them and told the plaintiff's president that she would pay for them. The subsequent discussion as to the name in which the goods were to be billed and shipped in, though possibly a fact to be considered by the jury, was not conclusive. The defendant purchased a portion for her own use ; had them marked with her initials and told the plaintiff she would pay for them, and they were



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subsequently delivered to and received by her. If the jury believed these facts, there certainly was evidence to sustain a recovery for the goods that she ordered and for which she promised to pay. There can be no question but what the charge of the goods to Crane was open to explanation. Bills, receipts and other instruments of like character are always open to explanation and are not conclusive upon any of the parties. The fact that the plaintiff made out the bill to Crane, charging the goods to him, is of course a fact to be considered by the jury in determining to whom the goods were actually sold; but there was certainly evidence to show that the defendant purchased these goods and agreed to pay for them. The real question is one of fact as to the actual purchaser of the goods, and the plaintiff's charge against Crane was one of the facts to be considered in determining the real question as to who purchased the goods. If the jury believed that the defendant purchased the goods and promised to pay plaintiff for them, the plaintiff was entitled to recover.

It follows that the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., CLARKE, HOUGHTON and LAMBERT, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HENRY HUFFMAN BROWNE, Appellant.

First Department, April 19, 1907.

**Crime — forgery in first degree in executing and uttering forged deeds — evidence — person whose name is forged need not be produced as witness — prior conveyances to fictitious grantees — judgment affirmed — adjournment.**

On the trial of an indictment for forgery in the first degree in forging and uttering deeds of real property, the evidence considered and judgment of conviction affirmed.

On the trial of an indictment for forgery it is not necessary that the person whose name is alleged to have been forged be produced as a witness and tes-

tify that he did not sign the paper or authorize the signature. These facts may be proved by other evidence.

Criminal trials cannot be indefinitely postponed because the defendant asserts that he has a material witness who cannot then be produced. To obtain an adjournment it is necessary to show that the applicant has not been guilty of neglect and that it is probable that the attendance of the witness can be had at the time to which the trial is proposed to be deferred.

On the trial of an indictment for forging a deed evidence of various conveyances of the property with which the defendant has been connected and the possible fictitious character of the grantees is competent as tending to show that the defendant was engaged in a scheme to defraud, which finally culminated in the forged conveyance.

So, too, transactions had with a person to whom the forged deed was given prior to and leading up to the final transaction were admissible.

Charge considered and approved.

APPEAL by the defendant, Henry Huffman Browne, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 23d day of March, 1906, convicting him of the crime of forgery in the first degree, and also from two orders respectively denying the defendant's motions for a new trial and in arrest of judgment.

*Clark L. Jordan*, for the appellant.

*E. Crosby Kindleberger*, Deputy Assistant District Attorney, for the respondent.

HOUGHTON, J. :

The indictment under which defendant was tried and convicted of the crime of forgery in the first degree contained a count for forging and another for uttering a deed purporting to convey as the act of one William R. Hubert certain real property situated in the county of New York to complainant Benjamin W. Levitan.

A certain tract of land of which the premises described in the deed were a part originally belonged, as is conceded, to one Mary Ann Peterson, who, with her entire family, in 1888, was drowned at sea. The defendant, who was a practicing attorney at law, had known Mrs. Peterson in her lifetime, and some while after her death instituted inquiries as to her collateral relatives, and claims to have ascertained that he discovered that one Clark and one Wing were the only heirs to whom the real estate descended upon her death.

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After these alleged heirs had been thus discovered it is claimed that one O'Rourke produced an unrecorded deed of the property to himself, signed by Mary Ann Peterson by her mark, although she was an educated woman and could write, to which defendant was a subscribing witness.

By six several conveyances, through real or mythical individuals, the title of the alleged heirs and of O'Rourke finally stood in the name of William R. Hubert. Such of the various grantees as were produced upon the trial testified that they held the title for defendant and simply for his accommodation, and the defendant claimed that those grantees who were not produced held it in the same manner, including Hubert himself. The defendant was the subscribing witness to all of these deeds except one.

Hubert was not sworn upon the trial and the forging of his name was proved by the notary, who testified that the defendant signed the name "Wm. R. Hubert" in her presence and acknowledged the execution of the deed and stated that he always wrote his christian name with the abbreviation which appeared, and that he was Hubert himself, producing letters to show that fact. The tender of the deed to the grantee Levitan was confessedly made by the defendant, with excuses for the absence of Hubert. The defendant denied that he personated Hubert in signing and acknowledging the deed, or that he signed the name to it, and testified that the deed was signed by Hubert and given to him for delivery and that Hubert was not an imaginary person but a real one, having an office in the city of New York, with mining interests in the west.

It is not a necessity that the person whose name is alleged to have been forged should be produced as a witness and testify that he did not sign the paper and did not authorize the person charged with the crime to sign it. These facts may be proved by other evidence. If Hubert was a fictitious person, of course he could neither sign nor authorize the signing; and if he was a real person the signing by defendant and lack of authority to do so was sufficiently proven *prima facie* by his personating Hubert in signing and acknowledging the deed. An issue was raised by this evidence which called upon defendant to show authority to sign the deed, if any existed. (*People v. D'Argencour*, 95 N. Y. 624.)

The People having thus proved that the deed was a forgery, the

uttering of it, which concededly was done by the defendant, constituted the crime of forgery in the same degree (Penal Code, §§ 509, 521), and it, therefore, made no difference under which count the jury may have found the defendant guilty.

Nor did it matter that another deed existed purporting to be signed by Hubert, conveying the premises to defendant himself. It was immaterial that another deed existed, if the alleged forged deed to Levitan purported to convey the premises and was forged and uttered with intent to defraud. The language of the Penal Code is, "by which any right or interest in property is or purports to be transferred."

The People by their proof made a question of fact upon which it was proper for the jury to pass, and no error was committed by the trial court in refusing to advise the jury to acquit the defendant for lack of proof.

It only remains to be considered, therefore, whether any error was committed on the trial which requires a reversal of the conviction.

The defendant urges that the court erred in refusing to grant him a postponement of trial for the purpose of obtaining Hubert as a witness.

The defendant was arrested on the 14th day of December, 1905, and plead to the indictment on the following eighteenth of January. The trial was called March twelfth following on two days' notice. He had been a practicing lawyer and he appeared in court without an attorney, stating that he thought he could conduct his own defense, and made his own motion for postponement of the trial on the ground that Hubert was at Goldfield, Nevada, and that he had only recently learned of his whereabouts, and that he desired time to procure his attendance. He claimed that he had received a letter showing Hubert's whereabouts, but that he had destroyed it. The funds of the district attorney's office, by direction of the court, were placed at his disposal for the purpose of telegraphing, and the court announced that the trial might proceed, and that if it became apparent that the witness was needed and could be located and procured, he would suspend the trial for that purpose. On suggestion of the court counsel was assigned to defendant, and such counsel appears to have acquiesced in this disposition of the matter, the

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defendant himself, however, protesting against it. The trial proceeded for four days, and after the defendant and all the witnesses produced by him had been sworn, the application for postponement was renewed, and the defendant admitted, in answer to interrogatories by the court, that he had made no effort since the opening of the trial to locate or procure the witness, and that it was impossible to get him here except as he might leave the west to come to the east in the course of his business affairs, which the defendant expected would be the case, and that he would arrive within a short time.

What took place in court we may assume to have been treated as a motion upon affidavits. Assuming this, however, we do not think the defendant made a case for postponement, or that the court was guilty of any abuse of discretion in failing to grant the motion. The alleged intimate relations existing between the defendant and Hubert, if he was a real person and actually existed, and the fact that the defendant was a lawyer and knew the necessity of procuring his attendance, bear very materially upon the situation. Although the defendant had been confined in jail, yet he could write and telegraph, and he must have appreciated the necessity of getting in communication with the witness so that his attendance could be procured when the trial was called, and of preserving all evidence relating thereto. No harm came to the defendant by the denial of the motion made at the beginning of the trial. In considering the motion made at the close of the trial there appeared the additional fact that Hubert was probably a myth, for no witness had ever seen him aside from the defendant, nor could any trace of him be found at his claimed address.

Criminal trials cannot be indefinitely postponed because the defendant asserts that he has material witnesses who cannot then be procured. Certain rules with respect to motions of such character have been established, and it is necessary to show that the party applying for postponement has not been guilty of neglect, and that it is probable that the attendance of the witness can be had at the time to which the trial is proposed to be deferred. (*People v. Jackson*, 111 N. Y. 362.) Under the case made by the defendant for postponement there was disclosed no probability that the attendance of the witness could be procured at any future day. Even

conceding that the defendant had been guilty of no neglect, the postponement was properly refused.

Evidence of the Peterson title and of the various conveyances of that property with which the defendant had been connected, and of the possible fictitious character of the grantees, as well as the Kuntz mortgage on the same property, was competent as tending to show that defendant was engaged in a scheme to defraud, which finally culminated in the conveyance of a portion of the property to a real purchaser for actual money. Upon a trial for forgery, or for uttering a forged instrument, facts which legitimately tend to show fraudulent intent or guilty knowledge are competent evidence. (*People v. Dolan*, 186 N. Y. 4; *People v. Gaffey*, 182 id. 257; *People v. Everhardt*, 104 id. 591.) So, too, the transactions had with the complainant Levitan respecting the Peterson deed and the Haines mortgage, prior to and in some degree leading up to the final transaction in which he agreed to buy the property described in the alleged forged deed, were competent to be proved. They tended to show that the defendant so dealt with Levitan as to probably intend to finally defraud him by inducing him to pay for a forged title. Evidence that the various persons could not be found at the addresses which defendant gave was competent. (*People v. Jones*, 106 N. Y. 523.) There is some confusion regarding the address given by the defendant of Samuel Haines; but the jury had all the facts before them and could determine whether or not investigation was made at the address which defendant gave. If a wrong address was investigated, it could not harm the defendant that the person was not found at that place.

It is insisted that the court erred in refusing to charge several of the requests submitted by the defendant. These requests do not appear to have been read in the presence of the jury, but seem to have been submitted to the court in writing and marked by him.

We do not think any error was committed in failing to charge such as were refused. They related mainly to abstract propositions not involved in the issues as presented upon the trial, and involved the question as to whether or not the defendant could be convicted of forgery if he and Hubert were one and the same person, or if he had adopted the name William R. Hubert as a pseudonym, or had been authorized by him to sign his name. There was no defense

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involving any of these propositions, and no proof upon which any one of them could be found in favor of defendant. There was claim on the part of the People on the trial that Hubert was a fictitious person; but the defendant insisted that he was not, but that he was a real individual who signed and acknowledged the deed in question, and that he himself did not take title in that name as his own, or sign the name to the deed as his own or sign it at all. If the defendant had taken a different position, and had proved that he took valid title in that name to himself, representing himself, and that he signed and acknowledged the deed under that name, or that Hubert being a real person had authorized him to sign his name to the deed, the various requests would have been pertinent to the issue. A court is justified in refusing to charge mere abstract propositions not involved in the issues. (*People v. Mallon*, 116 App. Div. 425.) Moreover, the requests were defective in omitting the element of fraudulent intent. It is a crime to forge the name of a purely fictitious person if it is done with intent to defraud. (*People v. Jones, supra*; *Brown v. People*, 8 Hun, 562; Penal Code, §§ 509, 522.) The court in his main charge repeatedly told the jury that they must acquit the defendant if he had authority to sign Hubert's name, and if there was no intent on his part to defraud by the use of the deed.

In our view the defendant had a fair trial in which no errors were committed calling for a reversal and was clearly proven guilty of the crime charged, and the conviction must, therefore, be affirmed.

PATTERSON, P. J., CLARKE and LAMBERT, JJ., concurred;  
INGRAHAM, J., concurred in result.

Judgment affirmed.

GEORGE S. NICHOLAS, Respondent, v. FRANKLIN B. LORD, as Trustee under a Certain Deed of Trust Made to Him by AUGUST BELMONT PURDY on or about March 16, 1892, and Others, Appellants, Impleaded with AUGUST BELMONT PURDY, Defendant.

First Department, April 5, 1907.

**Debtor and creditor — judgment creditor's action in affirmance of deed of trust for benefit of creditors — evidence — judgment roll admissible against trustee to establish debt — release of alleged claims by debtor admissible to disprove offset — extra allowance — parties — when other creditors necessary parties.**

In an action by a judgment creditor against trustees holding property under a deed of trust made by the debtor to pay creditors, the judgment roll in the action by the creditor against the debtor is admissible as proof of the indebtedness to the plaintiff if the claim accrued prior to the execution of the deed. The validity of a claim existing at the time of the execution of the trust deed may be established by an action subsequently brought without making the trustee a party defendant. The trustee is a proper but not necessary party to such action, and, even though not a party, the judgment is binding upon him in the absence of fraud or collusion.

Such judgment roll is *res adjudicata* as to any material findings of fact therein which facts may be used as evidence between the parties and their privies, although the creditor suing the debtor's trustee as aforesaid may not be entitled to recover the total amount of the judgment.

The judgment creditor had formerly been in partnership with the judgment debtor, and had obtained his judgment in an action for a partnership accounting. The debtor had brought a subsequent action to assert his claim to certain lands used in the partnership business, which action was discontinued, he executing a release of all claims upon the lands.

*Held*, that the release, although executed subsequent to the debtor's deed of trust for the benefit of creditors, was admissible in the judgment creditor's action against the trustee to show both that the creditor's former action was not compromised in the settlement of the action by the debtor, and also that any claim that the debtor had against the creditor on account of said lands was adjusted and satisfied;

That such release was not objectionable evidence on the theory that it was an admission or declaration of the grantor after the execution of the trust deed.

*Held, further*, that the debtor's cause of action, if any, against the creditor, not being assigned to the former's trustee, the debtor alone had a right to offset the same against the creditor.

In such creditor's action the court in its discretion may grant an extra allowance. Where a judgment creditor's action is brought in his own behalf and in behalf of other creditors, if any, in affirmance of a deed of trust and to recover there-



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under his *pro rata* share of the trust property, a judgment for the plaintiff alone is not warranted when there is no proof as to the non-existence of other claims upon the fund. There should be a reference and notice given affording other creditors an opportunity to become parties.

APPEAL by the defendants, Franklin B. Lord, as trustee, etc., and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of July, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

*Lucius H. Beers* [*Francis Woodbridge* with him on the brief], for the appellants Franklin B. Lord, as trustee, and Bertha G. Purdy.

*S. Sidney Smith* [*Elliot Smith* with him on the brief], for S. Sidney Smith, as guardian *ad litem* for the appellant Bertha Purdy.

*J. Hampden Dougherty*, for the respondent.

LAUGHLIN, J. :

The plaintiff is a judgment creditor of August Belmont Purdy, and brings this action in behalf of himself and all other creditors, if any there be, of said Purdy entitled to share in certain moneys and property assigned and transferred by Purdy to the defendant Lord, as trustee, by a deed of trust made, executed and delivered on the 17th day of March, 1892, upon trust "to pay any just debts which I may now owe," and after the payment of such debts to invest the residue of the money or property, and to receive the interest and income and apply the same to the use of the grantor's wife, Bertha G. Purdy, during her life, and upon her death to divide the property then remaining among the then living issue of the grantor in equal shares, *per stirpes*. The property assigned and transferred to Lord by the deed of trust was the debtor's interest under the will of his grandaunt, Abby G. Spring, which consisted of an undivided fifth interest in her residuary estate, and an undivided fifth interest in a specific legacy, which were subject, however, to the life estate of Purdy's mother, who died in 1904. The evidence tends to show that the value of the estate assigned and transferred to the trustee is about \$48,000, consisting of one-

fifth of a specific legacy of \$40,000, and one-fifth of the residuary estate, estimated to be approximately \$200,000. The action is not brought in plaintiff's own right as a judgment creditor and in disregard of the deed of trust to impress the property in the hands of the trustee with the lien of his judgment, but in affirmance of the deed of trust and in the right of other creditors, as well as his own thereunder, and judgment is demanded that the defendant Lord account to the plaintiff and to the other creditors, if any, of Purdy for the money and property received by him under the deed of trust, or for which he is accountable by reason thereof, and that he be directed to pay the plaintiff's claim and the claims of other creditors entitled to share under the assignment *ratably* to the extent of the property assigned.

The learned counsel for the trustee and for the other appellants, who are the wife and only child of Purdy, contend that plaintiff's judgment against Purdy is no proof as against them of the indebtedness. The plaintiff and Purdy, the judgment debtor, had been copartners in business as wholesale liquor dealers since 1875, at times alone and at times with another, under the firm name of "Purdy & Nicholas." On the 1st day of September, 1888, they were the sole members of the copartnership, and previously entered into an agreement in writing for the dissolution thereof, to take effect on that day, under which the firm's business was liquidated by plaintiff, and for that purpose Purdy assigned his interest in the "stock of merchandise, office and other furniture, fixtures, machinery, tackle, horses, harness and trucks, bills receivable, promissory notes, drafts, bills of exchange and accounts (excepting only such bad or doubtful accounts) at the aggregate of the valuations," to be stated in an inventory to be made pursuant to the agreement. On or about May 1, 1882, when the plaintiff and Purdy were the sole members of the firm, they occupied premises No. 43 Beaver street under a lease. At this time the premises were conveyed to the plaintiff, who executed a lease thereof to the firm, and the firm continued to occupy the premises under a lease from the plaintiff until its dissolution as aforesaid. The dissolution agreement, in addition to providing that an inventory should be taken of the assets of the firm, excepting the claim of the firm against Purdy on his personal account, and all accounts of money due or to grow due classified

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and considered as either bad or doubtful, also provided that a just and true account should be taken as of the date of the dissolution, of all debts and liabilities of the firm. It further provided that after deducting the aggregate inventoried valuation of the property to be received by the plaintiff, the amount of the debts and liabilities of the firm, including its indebtedness to the plaintiff for money loaned, together with interest thereon, and for the capital of \$80,000 contributed by him—Purdy contributed no capital—and all moneys standing to his credit on the books of the firm, “whatever balance, if any, shall remain, shall together with the balance standing on September 1, 1888, to the credit of an account in the books of said copartnership known as the No. 43 Beaver Street account, be considered and treated as the total amount of the profits of the business of said copartnership,” except as to the bad or doubtful claims, and that each partner should be credited with the share of such balance in the proportion to which he was entitled to share in the profits under the copartnership articles; but that the share of Purdy in such balance should remain subject to adjustment of his personal account with the firm. It was further provided that plaintiff should collect, as far as possible, the accounts classified as bad and doubtful, and out of the proceeds of such collection indemnify himself against any loss sustained on any of the accounts taken by him as good and for the expenses of collection, and that the remainder should be credited on the books to the partners in the proportion in which they were entitled to share in the profits, and that in case the collections from the accounts classified as bad and doubtful should be insufficient to indemnify the plaintiff for any loss arising on any of the accounts taken by him as good, Purdy agreed to reimburse him to the extent of one-third of the loss. It was further provided that the partnership lease of the premises No. 43 Beaver street should, immediately upon the dissolution of the firm, be surrendered to the plaintiff “and be thereupon altogether terminated and at an end.” It was further provided that either partner should be at liberty to engage in the same line of business, but that neither should use the copartnership name, nor describe himself as successor to the copartnership, excepting that either partner might use any trade mark or design belonging to the firm

omitting the firm name, and that plaintiff might use the firm labels on hand and theretofore ordered, and that until the copartnership should be finally liquidated and adjusted he should be at liberty "to keep and maintain upon the front of the premises where business shall be carried on signs bearing the name of said copartnership with the words 'In liquidation,' or words to that effect, appended thereto."

It appears that plaintiff continued business on his own account at the same place and collected the accounts, sending Purdy two statements thereof, one in 1890 and another in October, 1891, when the accounts had been collected so far as they were deemed to have any value. On the 27th day of July, 1894, plaintiff brought an action in the Supreme Court against Purdy on the dissolution agreement for the balance due to him from Purdy thereunder or for permission to account thereunder, alleging the material facts, including the agreement with respect to the Beaver street property, as set forth in the dissolution agreement, and demanding judgment for \$22,582.61, with interest thereon from the date of dissolution, less the sum of \$11,087.65, together with interest thereon, for which it was conceded the defendant was entitled to credit. The defendant defaulted and the plaintiff recovered judgment against him for the sum of \$16,562.64 upon the report of a referee appointed by the court to take and state the account under the liquidation agreement, which was confirmed by the court.

Upon the trial of this action plaintiff introduced in evidence the judgment roll in his action against Purdy. Owing to the fact that the final figures of the judgment recovered by him against Purdy did not represent the indebtedness existing at the time of the execution of the trust deed to Lord, he has not recovered in the action the total amount of the judgment recovered by him in his action against Purdy, but he recovered the amount of the indebtedness owing to him by Purdy at the time of the execution of the trust deed, as shown by the findings of the referee contained in the judgment roll in the action against Purdy, which specified the amount of the indebtedness from Purdy to the plaintiff on the 1st day of September, 1888, and interest was allowed thereon to the date of the execution of the trust deed, and from the total was deducted the amount to which the referee found Purdy was entitled to credit,

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together with interest thereon to the date of the trust deed, leaving a balance of \$13,937.63, for which amount, together with the interest thereon from the date of the trust deed, less three small items of credit specified, together with interest thereon, for accounts deemed uncollectible but subsequently collected by the plaintiff, plaintiff has recovered herein.

The first point to be considered is the contention of the appellants that it was incumbent upon the plaintiff to show Purdy's indebtedness to him by other evidence than the judgment roll in the action brought by him against Purdy, which was commenced long after the execution of the deed of trust. The only consideration recited in the deed of trust is the nominal consideration of one dollar, and no other consideration was shown. Purdy's indebtedness to the plaintiff had accrued prior to the execution of the deed of trust. As already observed, however, in view of the form of the action, we are not concerned with the question as to plaintiff's right as a creditor of Purdy to follow his property in the hands of one who has acquired the same without consideration or with knowledge of the facts. Defendant Lord, by accepting the trust, has stepped into the shoes of Purdy with respect to the claims existing against him at the time of the execution of the deed of trust, to the extent of the property transferred thereunder. It is his duty as such trustee, both to Purdy and the other creditors, to apply the property only in payment of legal claims; but the validity of a claim existing at the time of the execution of the deed of trust could be established in an action subsequently brought, and without making the trustee, who would be a proper but not a necessary party, a party defendant, and the judgment would be binding and conclusive on the trustee, even though not a party, in the absence of fraud or collusion, which it would be incumbent upon him to show. (*Candee v. Lord*, 2 N. Y. 269; *Merchants' Nat. Bank v. Hagemeyer*, 4 App. Div. 52; *Matter of Roberts*, 98 id. 155; *Burgess v. Simonson*, 45 N. Y. 225; *Ledoux v. Bank of America*, 24 App. Div. 123; *Pringle v. Woolworth*, 90 N. Y. 502; *Decker v. Decker*, 108 id. 128; *Swihart v. Shaum*, 24 Ohio St. 432.) No evidence was offered by the appellants tending to impeach the judgment for fraud or collusion. There is no merit in the further claim that since the judgment was not binding upon the trustee as to the total amount of the recovery

— which was conceded and, therefore, is not presented for adjudication—it could not be used to establish the amount of Purdy's indebtedness to plaintiff prior to the execution of the deed of trust. The judgment is not in the nature of a declaration or admission made by Purdy after the execution of the deed of trust, which probably would not be binding on the trustee (see *Williams v. Williams*, 142 N. Y. 156); but it is a conclusive determination by the court of facts in an action between the parties, and any material finding of fact therein could be used as evidence between the parties or their privies. That is the use that was made in this action of the judgment roll in the action by the plaintiff against Purdy.

The appellants further contend that the court erred in excluding evidence offered by them with a view to showing that the property No. 43 Beaver street, already referred to, was copartnership property, and that plaintiff had never accounted to Purdy for his interest therein. The appellants, under their plea that Nicholas and Purdy had on the 5th day of May, 1902, compromised, settled and adjusted all claims between them, were permitted to show that in 1901 Purdy brought an action against the plaintiff, alleging that the premises No. 43 Beaver street were purchased under a contract made by the firm, and that the title was taken in the name of Nicholas for the firm by consent, but upon the agreement and understanding that it should be held and deemed to be a partnership asset and so carried on the books of said firm, and credited with rent and other income, and charged with taxes, repairs, interest and capital invested therein and other expenses incidental to carrying the same; that he never accounted for the rents, issues or profits, and demanding that the premises be declared a copartnership asset; that an accounting be had of the rents, issues and profits and expenses; that the property be sold, and that one-third of the surplus income over expenses and proceeds of sale, less the judgment recovered by Nicholas against Purdy, be paid to the plaintiff therein; that Nicholas answered, admitting that the firm entered into a contract for the purchase of the premises, but alleging that before the time for consummation thereof Purdy sold and assigned his interest under the contract to Nicholas, who thereupon purchased and took title on his own account, paying the entire consideration individually, securing at first part of the purchase price

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by a purchase-money mortgage and his individual bond, and pleading the judgment recovered by him against Purdy on the liquidation agreement, in bar, and setting up as a separate defense that at or shortly before he first leased the premises No. 43 Beaver street to the firm he entered into an agreement with the firm to the effect "that an account should be carried upon the books of the firm of Purdy & Nicholas, to be known as the 43 Beaver street account, such account to be charged with interest upon the moneys paid by the defendant to his vendor, and upon the mortgage executed by him as aforesaid, and with the annual taxes upon said premises, insurance and repairs, and to be credited with an arbitrary rental arranged between the plaintiff and himself—the understanding being that the balance, if any, to the credit of said account above such arbitrary rental should, upon the dissolution of their copartnership, be carried into the profit and loss account of the firm and credited to the plaintiff and the defendant respectively, in the proportions in which they respectively shared in such profits;" that an account in accordance with such agreement was kept and on the dissolution of the firm the account was closed and credited in accordance therewith, and the lease was surrendered to him; that the action was subsequently settled for \$500, paid by the plaintiff herein, and discontinued. The plaintiff was then permitted to show that at the time of settling and discontinuing the action, a release was executed to him by Purdy, releasing any claim Purdy had against him on account of any interest in the premises No. 43 Beaver street, which release also contained an express admission on the part of Purdy that the premises never were copartnership property and always belonged to the plaintiff, and that it was without prejudice to the judgment recovered by the plaintiff against Purdy, which was admitted to be valid and in force "and a conclusive settlement of all questions of every name and nature relating to the partnership of Purdy and Nicholas; and I hereby admit that no part thereof has been paid and that I have no defense whatsoever of any kind or description thereto." The release was received under the objection and exception of the appellants, who contend that it contains admissions and declarations by Purdy subsequent to the execution of the trust deed, which are incompetent. Admissions and declarations of the grantor after execution and delivery of the deed

are incompetent to affect the grant. (*Williams v. Williams*, 142 N. Y. 156; *Scheps v. Bowery Savings Bank*, 97 App. Div. 434.) These admissions or declarations do not tend to impeach the title, but relate to the existence and validity of claims which it was one of the conditions of the trust should be paid by the trustee; but whether or not Purdy's declarations or admissions with respect to his debts, made after the execution of the trust deed, would be admissible against the trustee need not be decided, for the reason that this release was competent, not only as rebutting the claim of the appellants that the judgment recovered by the plaintiff against Purdy was settled and compromised in the settlement of the action brought by Purdy against the plaintiff, but also showing that any claim that Purdy may have had against the plaintiff on account of the Beaver street property was adjusted and satisfied. The contention of the appellants in this regard appears to be that they are entitled to show as an offset to or in reduction of the plaintiff's judgment, Purdy's interest in the Beaver street property. As already observed, the claim on which the plaintiff recovered his judgment existed prior to the execution of the trust deed, and it had not been paid. The fact, if it were true, that Purdy had some claim against the plaintiff on account of the Beaver street property arising out of their copartnership transactions, agreement or relations, might, while the claim existed, and after an accounting with respect thereto, justify or require that it be offset against plaintiff's claim; but Purdy's cause of action, if any, against the plaintiff was not assigned to the trustee. Purdy, therefore, was at liberty to prosecute it, or to compromise it, and it must follow that plaintiff was at liberty to settle his liability, if any, to Purdy, without affecting his right to enforce his judgment against Purdy against the property assigned to the trustee. Since Purdy did not assign his claim on account of the Beaver street property, if any he had, to Lord, as trustee, he alone had a right to assert or to settle that claim with the plaintiff. In this view of the case, it is unnecessary to decide whether any claim that Purdy may have with respect to the Beaver street property on account of the copartnership relations, was embraced within the issues in the action by the plaintiff against him, and barred by the judgment therein.

This was a case in which the court might in its discretion grant



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an extra allowance, and we do not feel justified in modifying the judgment in that regard.

These views would lead to an affirmance, were it not for the fact that there has been no proof on the question as to the existence of other claims, and the trustee pleads that he has no knowledge on the subject. The action being a representative one, I am of the opinion, therefore, that the protection of the rights of other creditors and of the trustee requires that there should be a reference, and notice given and opportunity afforded to other creditors to become parties to the action and to present and prove their claims according to the practice prescribed in analogous cases, to the end that the judgment may be binding upon other creditors, if any there be, and may protect the trustee. (*Kerr v. Blodgett*, 48 N. Y. 62; *Matter of Ziegler*, 98 App. Div. 117; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 180; *Wilder v. Keeler*, 3 Paige, 164.) The findings are sufficient with respect to the plaintiff's rights, and as a basis for an interlocutory judgment for an accounting by the trustee, and appointing a referee to advertise for, and take and report proof of claims of other creditors.

It follows, therefore, that the judgment should be modified, with costs in this court to all parties appearing separately, payable out of the trust property, by making it an interlocutory judgment authorizing other creditors to become parties and prove their claims according to the usual practice in analogous cases, and appointing a referee to take and state the account of the trustee and to advertise for and take proof of claims and report thereon, and for final judgment upon the coming in of the referee's report in accordance with this opinion and with the trust deed.

PATTERSON, P. J., HOUGHTON and LAMBERT, JJ., concurred; SCOTT, J., concurred, except as to costs.

Judgment modified as directed in opinion, with costs to all parties separately appearing, payable out of the trust fund. Settle order on notice.

JAMES R. HASKELL, Respondent, v. LENA M. MORAN, as Administratrix, etc., of JOHN B. MORAN, Deceased, Appellant.

First Department, April 5, 1907.

**Parties — when plaintiff may amend to bring in additional defendants jointly liable.**

In an action at law for a money judgment where a party elects to sue one only of parties jointly liable on a contract and the defendant demurs to the complaint upon the ground that the other parties liable have not been joined, the court has power to allow an amendment bringing in the other parties if the plaintiff show an adequate excuse for not joining them and the defendants will not be prejudiced especially when the plaintiff might not be entitled to sue the original defendant alone.

*Query*, as to whether other parties may be brought in when the action is in tort. Cases collated and discussed.

(PER INGRAHAM, J.): Under such circumstances the plaintiff should be allowed to bring in additional defendants without excusing his failure to do so in the first instance, unless the granting of the application will deprive some party of a legal right or the delay will cause injury to an adverse party.

APPEAL by the defendant, Lena M. Moran, as administratrix, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of February, 1907, granting leave to plaintiff to serve an amended summons and a second amended complaint herein, adding the name of Ross F. Robertson as a party defendant.

*Edwin F. Stern* [*Francis W. Russell* with him on the brief], for the appellant.

*Frank L. Crocker*, for the respondent.

LAUGHLIN, J.:

This is an action against the administratrix of a deceased member of a copartnership to recover on a contract obligation of the firm. Ross F. Robertson, who under the order appealed from is to be brought in, was a member of the firm at the time the obligation was incurred. The defendant answered without raising the objection that there was a defect of parties defendant. The plaintiff there-

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after moved for leave to serve an amended summons and complaint, making Robertson a party. The motion was denied. It may very well be that it was denied upon the theory that the plaintiff would not be prejudiced by being required to proceed against the party originally sued without joining the other, inasmuch as he was in a position to recover against the estate, owing to the fact that the objection that there was a defect of parties had been waived. The plaintiff thereafter amended the complaint in other respects and the defendant, by leave of the court, instead of answering as before, demurred upon the ground that Robertson should have been joined. Plaintiff then again moved for leave to bring in Robertson. The motion was granted, but this court reversed the order upon the grounds that the affidavit was made by the attorney without excusing his failure to present the affidavit of his client, and that inasmuch as the motion was renewed on substantially the same facts, leave of the court should have been obtained; but we permitted plaintiff to apply to the Special Term for leave to renew the former motion. (*Haskell v. Moran*, 117 App. Div. 251.) Leave to renew the motion was obtained and the motion was renewed and granted.

It is urged by the appellant that plaintiff has not yet satisfactorily excused his failure to join Robertson originally. The explanation of this failure is not very satisfactory and it would not be accepted if either the defendant or Robertson would be prejudiced by granting the order; but since they will not and the plaintiff may be unable to maintain the action against the administratrix alone, we are not disposed to overrule the Special Term in accepting the excuse as sufficient in the circumstances.

The further point is now urged that the court had no jurisdiction to grant the order. This objection is based upon the theory that in an action at law, for a money judgment only, where the plaintiff elects to sue one only of two or more parties liable, either on contract or in tort, the court is without authority to bring in any of the parties jointly liable who were not originally sued. We do not so understand the law, although there are conflicting opinions on the subject. In *Heffern v. Hunt* (8 App. Div. 585) it was held in the fourth department that neither section 452 nor section 723 of the Code of Civil Procedure confers authority on the court to grant an order on the application of the plaintiff in an action for negli-

gence to bring in an additional joint tort feasor. FOLLETT, J., however, dissented upon the ground that since they might have been joined originally, section 723 conferred authority upon the court to authorize the amendment. That decision might well have stood upon the ground that since the issues could be determined upon the merits as between the plaintiff and the tort feasor, whom he had seen fit to sue originally, there was no necessity or propriety of allowing him subsequently to join another or others in the same action, although he might have done so originally. It was, therefore, unnecessary to decide whether or not the court had power to allow the amendment.

It is manifest that even if the power to authorize bringing in a joint tort feasor exists it would not ordinarily be exercised, for the reason that the case could proceed to judgment upon the merits between the original parties as other joint tort feasons would not be *necessary* parties. The *Heffern* case was followed by the Appellate Term in *Romanoski v. Union Railway Co.* (31 Misc. Rep. 762), reversing the General Term of the City Court (30 id. 830), and this court recently in *Horan v. Bruning* (116 App. Div. 482; 101 N. Y. Supp. 986) held, two members of the court, however, dissenting, that an additional tort feasor may not be brought in in an action for negligence against his objection. The Appellate Division in the second department in *Schun v. Brooklyn Heights R. R. Co.* (82 App. Div. 560) held, adopting the dissenting opinion of FOLLETT, J., in *Heffern v. Hunt* (*supra*), that in an action for negligence an order may be made bringing in additional joint tort feasons. In *Hochman v. Hauptman* (76 App. Div. 72) this court held that in a replevin action an additional defendant *should not* be brought in against his will, and in *Goldstein v. Shapiro* (85 id. 83) the Appellate Division in the second department held in a replevin action that a third party who asserted title to the property *could not* be brought in against his objection, but the opinions in those cases are based largely upon the ground that if a third party were to be brought into a replevin action by amendment he would lose the benefit of some of the provisions of the Code of Civil Procedure which would have inured to him had he been designated as a defendant originally. In *Ten Eyck v. Keller* (99 App. Div. 106) the Appellate Division in the third department held in an action for

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conversion that the court could not on the plaintiff's own motion, under section 452 of the Code of Civil Procedure, bring in a third party in whom defendant alleged title. In *Chapman v. Forbes* (123 N. Y. 532) it was held that the plaintiff, in an action at law to recover a judgment for money only, could not be *compelled* to bring in other parties than those he has seen fit to sue. It will be observed that in all of these cases, where leave to amend was denied, the party sought to be brought in was not a necessary party to the determination of the issues upon the merits between the original parties. The liability of a party sued for negligence, for conversion or in replevin, is not and cannot be dependent upon whether he has been sued alone or with another party or parties. Where, however, a plaintiff has erroneously sued one or two or more parties liable on contract only jointly, the merits of the action cannot be reached without the presence of the other parties; and, consequently, it is manifest that authority is conferred by section 723 of the Code of Civil Procedure to bring in the other party or parties jointly liable with the party originally sued; but, as already observed, the exercise of the power by the court will depend upon the excuse presented for not having joined all necessary parties originally. The case of *Lewin v. Wright* (31 Hun, 327) is directly in point on the facts here presented, and it was there held, citing *New York State Monitor Milk Pan Assn. v. Rem. Agr. Works* (89 N. Y. 22), that in an action on contract, where a demurrer had been interposed, taking the objection that there was a defect of parties defendant, the court was authorized by section 723 of the Code of Civil Procedure to allow an amendment on the application of the plaintiff, by bringing in all necessary parties. It being at least doubtful, as we observed on the former appeal, whether the administratrix of the deceased partner can be held liable on the copartnership obligation, without the presence of the other partner, the motion in this case was properly granted.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, J., concurred; PATTERSON, P. J., and SCOTT, J., concurred in result.

INGRAHAM, J. (concurring):

I concur with Mr. Justice LAUGHLIN, except in so far as he intimates that an application of this kind should not be granted, unless a failure of the plaintiff to make the parties sought to be joined defendants in the first instance is excused or explained. I think in all these cases a plaintiff, when the case comes up for final disposition, should be allowed to have his pleadings in the condition in which he desires them, and that an application to amend the pleadings or to add additional parties should be granted unless it appears that in granting the application some party will be deprived of a legal right or a delay in asking for the amendment will cause an injury to an adverse party. The fact that a plaintiff, by reason of a mistaken understanding of the law or of the facts, or as to the necessity of the presence of one or more persons as parties to the action, has omitted to set out allegations in his complaint or neglects to make persons parties to the action, should not, as I view it, preclude him from having the mistake corrected by motion, although he knew all the facts when the action was originally instituted. There can be no possible advantage in compelling a plaintiff to discontinue an action and commencing a new one, except a mere question of costs, and the court has power by awarding costs as a condition of the amendment sought for to protect any party to the action. Section 723 of the Code, as I view it, expressly gives the court power to amend the summons and complaint by adding additional parties, and while in some cases it may be unjust to allow such an amendment, in actions in tort or replevin or for personal injuries, certainly in an action upon a joint obligation where the omitted party is necessary to enable the plaintiff to maintain the action, the plaintiff should be allowed to bring in the joint obligor without the necessity of discontinuing and commencing a new action.

Order affirmed, with ten dollars costs and disbursements.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent,  
v. RICHARD A. McCURDY, Appellant. (Action No. 1.)

First Department, April 5, 1907.

**Pleading — action at law against president of a corporation to recover corporate moneys expended for political purposes and upon improvident contracts — when each payment does not give rise to separate cause of action.**

The complaint in an action at law against the president of an insurance corporation having general superintendence of the affairs and officers of the company and empowered to establish rules and regulations for the business, which alleges that the defendant "made or authorized to be made or knowingly or negligently permitted to be made" unauthorized and unlawful payments of specific amounts of the funds of the corporation for political purposes and negligently failed to establish rules to prevent such payments, etc., is sufficiently definite and certain even though it be not expressly alleged whether the defendant authorized or personally participated in the payments or whether they were made by others through his neglect to properly supervise the affairs of the company and perform the duties of his office. This, because in either event the defendant would be liable, and in such cases allegations in the alternative are permissible and the plaintiff is not required to elect in advance and stake the result of the issue on an ability to prove to the satisfaction of the jury the one alternative to the exclusion of the other.

Allegations that political contributions aggregating a certain sum were made at various times unknown to the plaintiff in pursuance of a single scheme and policy to deplete the funds of the company states a single cause of action. Each separate payment does not give rise to a distinct action which must be separately stated and numbered. This, because the defendant held the position of president and trustee continuously during the period, and the action is founded upon his breach of official duty and for general unliquidated damage caused thereby.

In such action it is immaterial whether the defendant's election as president were valid so long as he was suffered to exercise the official duties by the acquiescence of the company so as to become a *de facto* officer and chargeable with the responsibilities of the positions occupied.

An allegation that the defendant "directly or negligently" permitted certain officers, trustees and employees of the corporation to establish and maintain a "confidential fund" of the company and to expend and disburse the same for unauthorized and unlawful purposes, states but a single cause of action which is sufficiently definite.

Allegations that the defendant "knowingly or negligently" made unauthorized and improvident agency contracts with a member of his family, and paid thereunder grossly excessive commissions, and "knowingly or negligently"

permitted payments of a sum stated not embraced in the agency contracts or authorized to be made, etc., state a cause of action for general damage sustained by unauthorized payments.

Allegations that the defendant induced his corporation to create the office of superintendent of the foreign department to enable him to appoint his son thereto, and "that having thereupon made or authorized or knowingly or negligently permitted the making of" a pretended contract between the plaintiff and defendant's son at exorbitant rates of commission, etc., states a single cause of action with sufficient definiteness.

INGRAHAM, J., dissented in part, with opinion.

APPEAL by the defendant, Richard A. McCurdy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1906, denying the defendant's motion to strike out certain allegations of the complaint as irrelevant and redundant, and to require that the complaint be made more definite and certain and to have the facts constituting the several causes of action separately stated and numbered.

*De Lancey Nicoll* [*Courtland V. Anable* with him on the brief], for the appellant.

*Joseph H. Choate* [*James McKeen* and *Joseph H. Choate, Jr.*, with him on the brief], for the respondent.

LAUGHLIN, J. :

The excellent opinion of the learned justice who presided on the hearing of this motion at Special Term meets with our approval and renders further discussion of many points argued on the appeal unnecessary, excepting to emphasize views already briefly outlined by him.

This is an action at law. The complaint contains nine counts. In the first six paragraphs of the first count, which are repeated by reference in each of the others, it is alleged in substance that plaintiff is a domestic life insurance corporation, with by-laws duly adopted; that pursuant to its charter and by-laws defendant was on the 4th day of June, 1866, duly elected trustee of plaintiff for the term of four years; that he accepted and thereafter, by virtue of successive re-elections, continued to hold the office and act as such trustee until the 3d day of January, 1906; that he was duly elected president of the company for the term of one year on the 3d day of



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June, 1885, and annually thereafter was re-elected and continued to hold the office and to act as president until the 29th day of November, 1905; that he was expressly authorized by the by-laws to suspend or remove agents at pleasure, to preside at meetings of the trustees and of standing committees, except the auditing committee and committee on expenditures, and was *ex officio* a member of all standing committees with the exception of those two, was given the "general direction and superintendence of the affairs and of the officers of the company," and it was made his duty to establish "rules and regulations for the conduct of the business of the company and for the direction of its officers."

For its first cause of action plaintiff *further* alleges that defendant, in the year 1896, "*made or authorized to be made, or knowingly or negligently permitted to be made,*" an unauthorized and unlawful payment of \$15,000 of plaintiff's funds for political purposes, and negligently failed to establish proper or adequate rules to prevent such payment, to its damage in the sum of \$15,000. It is quite clear that there is but one cause of action here alleged, and it is to recover the damages sustained by the company through this unauthorized and unlawful appropriation of its funds. It is not definitely charged whether defendant expressly authorized and personally participated in the payment or whether it was made by others through his neglect to properly supervise the affairs of the company and perform the duties of the office which he held and assumed. Plaintiff knows that it was one or the other, or both, but not which. In either event defendant would be liable. In such case an alternative allegation is permissible, and plaintiff should not be required to elect in advance and stake the result of the issue on its ability to prove to the satisfaction of a jury the one to the exclusion of the other. (*Everitt v. Conklin*, 90 N. Y. 645; *Stern v. Ladew*, 51 N. Y. St. Repr. 456; *Mann v. Cook*, 24 Abb. N. C. 314; *Hasberg v. Moses*, 81 App. Div. 199; *Garrett Co. v. Astor*, 67 App. Div. 595. See, also, *Smith v. Rathbun*, 22 Hun, 150.) It is analogous to an allegation in an action to reform an instrument in writing where it has frequently been held that an allegation that a clause was inserted or omitted through mutual mistake or through fraud on the part of the defendant was good pleading, and proof of

either alternative would sustain the action. (*Christopher & Tenth St. R. R. Co. v. Twenty-third St. R. Co.*, 78 Hun, 462.)

The additional allegations in the second, third and fourth causes of action relate to single political contributions in the years 1900 and 1904 respectively. They are otherwise in all respects similar to those contained in the first, and the observations already made render further discussion thereof unnecessary.

The further allegations in the fifth cause of action relate to political contributions, aggregating not less than \$200,000, at divers times subsequent to the 1st day of January, 1885, it being alleged that the precise times are unknown to plaintiff; but otherwise the allegations are the same as those contained in the first cause of action. These disbursements were all without authority and are alleged to have been made in the execution of a single scheme and policy to deplete the funds of the company. The additional questions are here presented as to whether each of the negligent acts of the defendant which resulted in a loss to plaintiff and his negligent acts during each term of office as trustee and president constitute a separate cause of action. We are of opinion that they do not. He held the positions continuously, and the action is to recover the damages sustained by the company for the direct injury caused by his general wrongful acts or negligence in the performance of or in failing to perform his duties as agent of the company throughout the entire period. Although the action is at law and appears to be classified as in tort (*Hun v. Cary*, 82 N. Y. 66), the wrong or neglect is not disconnected with the *office, but consists of a breach of duty*, express or implied, to exercise proper care and faithfulness in the discharge of the duties of the office; and is not to recover specific sums lost to the company by reason of the wrongful acts or negligence, but general unliquidated damages, the items of which it is not necessary to plead, nor is the nature of the action changed by the fact that in some instances they have been pleaded. (*Hun v. Cary*, *supra*; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 383; S. C., 6 App. Div. 509; *affd.* on opinion of INGRAHAM, J., 150 N. Y. 572; *Mabon v. Miller*, 81 App. Div. 10; *Dykman v. Keeney*, 154 N. Y. 483; *Bosworth v. Allen*, 168 id. 157; *Higgins v. Tefft*, 4 App. Div. 62; *Mason v. Henry*, 152 N. Y. 529; *Hanna v. Lyon*, 179 id. 107; *Bowers v. Male*, 186 id. 28, 34.)

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In *People v. Tweed* (63 N. Y. 194) it was held that a complaint in an action to recover various sums of money obtained from the city by the defendants at divers times by fraudulent acts, in procuring fictitious bills to be presented and audited in formal compliance with the law, pursuant to a preconceived conspiracy on their part to loot the treasury, constituted but a single cause of action, not for the negligence of the defendants in the performance of public duty, but for fraudulently obtaining the money. In the decision of that case no special importance was attached to the allegations with respect to the conspiracy; and it is well settled that conspiracy does not constitute the gravamen of an action for damages, but that the effect of the allegation merely is to connect the acts and parties with one another. If the separate fraudulent acts by which money was wrongfully obtained at different times do not constitute separate causes of action, it would seem that separate wrongful or negligent acts would not *necessarily* constitute separate causes of action. It is clear that in a suit in equity for an accounting, which is authorized as to property coming into the hands of a director or trustee of a corporation, or for his breach of trust which may consist of "culpable acts and omissions," the facts may be alleged in a single count, although the acts resulting in the damage to the corporation may have been many and disconnected and separated by long periods of time. (*Bosworth v. Allen, supra*; *Mabon v. Miller, supra*; *Mason v. Henry*, 152 N. Y. 529.)

In *Smith v. Rathbun (supra)* it was held that an action against directors of a bank to recover damages sustained by the corporation through their neglect to perform their duties, the negligence consisting in both malfeasance and nonfeasance, constituted but a single cause of action. That decision although not cited appears to be directly in point.

Neither the validity of the defendant's election nor the term for which he was elected is material. It is precisely the same as if he assumed the functions of the office and was suffered to exercise them continuously by acquiescence of the company. As a *de facto* officer, having assumed and exercised the functions of the offices, he became chargeable with all of the responsibilities of the positions which he occupied, and he owed a duty of diligence and fidelity to the company to neither direct unauthorized or unlawful disburse-

ments nor negligently suffer them to be made. Plaintiff at most will only be required to show his first election or assumption of the duties of the respective positions, and that he continuously thereafter held the offices and assumed to exercise their functions, and his failure to perform the duties incident thereto and the resulting damages.

The motion does not involve the sixth cause of action.

The additional allegations of the seventh count are that defendant *directly or negligently* permitted certain officers, trustees and employees of plaintiff to establish and maintain with funds of the company, without authority, during the period from the 1st day of January, 1900, until the close of the year 1905, a "Confidential Fund," and to expend and disburse the same for unauthorized and unlawful purposes to its damage in the sum of \$600,000. The diversion of the money to the fund and the disbursement thereof are all charged to have been without authority and unlawful. That this is but a single cause of action, stated with sufficient definiteness, is shown by the views already expressed.

The eighth cause of action relates to *knowingly or negligently making* unauthorized and improvident agency contracts annually from the year 1893 to the year 1905, inclusive, with Charles H. Raymond & Co., of which firm defendant's son-in-law was a member, and agreeing to pay and paying thereunder unnecessarily high and grossly excessive and exorbitant rates and commissions, and to *knowingly or negligently permitting* payments aggregating not less than \$500,000, not embraced in the agency contracts or authorized to be made to said firm during said term, in all to plaintiff's damage in the sum of \$1,250,000. These allegations do not require special comment. They state a cause of action for general damages sustained by unauthorized payments to a particular firm during the period of defendant's administration of the offices, *knowingly or negligently permitted* by him, in part under unauthorized and fraudulent contracts, and in part without authority or consideration, and the amount in excess of what would have been reasonable and proper is stated.

In the ninth count defendant is charged with having induced plaintiff to create the "office of Superintendent of the Foreign Department" in the month of January, 1886, to enable him to appoint his

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son Robert H. McCurdy thereto, and *with having thereupon made or authorized, or knowingly or negligently permitted the making of*, a pretended contract between plaintiff and his son at an exorbitant rate of commission, which position defendant's son held, enjoying the fruits of the contract until June, 1903, when he resigned and was, on July first thereafter, appointed general manager of plaintiff at an annual salary of \$20,000, which was subsequently increased to \$30,000. This count states but a single cause of action and with sufficient definiteness.

The motion to strike out paragraphs 36 and 38 was also properly denied.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., CLARKE and SCOTT, JJ., concurred; INGRAHAM, J., dissented in part.

INGRAHAM, J. (dissenting in part):

I concur with Mr. Justice LAUGHLIN in the conclusion at which he has arrived, except as to the fifth cause of action. The action is at law, to recover for moneys of the plaintiff which the defendant, as its president, has caused to be paid for purposes other than corporate purposes. The first four causes of action are to recover for certain specific payments made for political purposes or contributions to political parties. The fifth cause of action is upon an allegation that "at various times subsequent to the first day of January, 1885, and to the plaintiff unknown, the defendant made, or authorized to be made, or knowingly or negligently permitted to be made, in furtherance of a single policy or design, certain payments aggregating not less than two hundred thousand dollars (\$200,000), out of the plaintiff's moneys, for certain political purposes, to wit, to defray the expenses of the annual campaigns conducted by a political party in furtherance of the election of the nominees of the said party for political offices." Each payment would be a wrongful act for which the defendant would be liable if the payment made was for an illegal purpose, or without authority from the corporation. While the officers of a corporation may be called to account for their illegal acts, or for an illegal disposition of the money or property of the corporation, in an action at law I think

that each illegal disposition of a corporation's property is a separate cause of action. The distinction between an action in equity to call an officer of a corporation to account and an action at law against an officer of a corporation to recover for an illegal or unauthorized disposition of the moneys of the corporation that the officer has made is clear; for when a trustee or person holding money or property in a fiduciary relation is called upon to account, he can in one action be required to account for all the money or property of the corporation that he has received and for which he is accountable; but in an action at law to recover from an officer of a corporation for money of the corporation that he has illegally or improperly paid out, each payment thus illegally or improperly made is a separate cause of action which must be separately pleaded.

This is not an action to recover damages sustained by the corporation for negligence or wrongdoing which has caused the corporation damage, but to recover specific money of the corporation paid by the president for illegal or unauthorized purposes.

I think, therefore, that the plaintiff should be required to separately number the various causes of action alleged as a fifth cause of action.

Order affirmed, with ten dollars costs and disbursements.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent,  
v. RICHARD A. McCURDY, Appellant. (Action No. 2.)

First Department, April 5, 1907.

**Pleading — suit in equity for accounting against president of insurance corporation — general accounting for all items received.**

In a suit in equity brought by an insurance corporation against its former president to require him to account for expenditures and disbursements "made, or caused or knowingly permitted to be made, by him or his agents and servants" from moneys received by him in his fiduciary capacity and taken from the treasury through a system of false and fraudulent bills and vouchers, etc., and for unauthorized and unlawful purposes, as to the details of which transactions the plaintiff is without knowledge or information, or means of obtaining knowledge or information, the plaintiff is not required to set forth the details with a precision rendered impossible owing to the misconduct of the defendant

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in falsifying the records. Even though not distinctly a trustee, such allegations empower a court of equity to require the president of a corporation to account for the corporate property.

Each sum of money or item of property which came into the hands of the defendant in his official capacity does not give rise to a separate cause of action, and the complaint will not be required to be divided into as many separate actions as there are items of property claimed to have been received.

An officer of a corporation who exercised his functions continuously may be required to account in equity for moneys received under a single count.

APPEAL by the defendant, Richard A. McCurdy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1906, denying the defendant's motion to have the complaint made more definite and certain, and the statement of facts constituting the several causes of action separately stated and numbered.

*De Lancey Nicoll* [*Courtland V. Anable* with him on the brief], for the appellant.

*Joseph H. Choate* [*James McKeen* and *Joseph H. Choate, Jr.*, with him on the brief], for the respondent.

LAUGHLIN, J. :

This is a suit in equity to require the defendant to account for expenditures and disbursements "made, or caused or knowingly permitted to be made by him or his agents and servants" from moneys received by him or which came into his custody and possession or under his control as trustee and president of the plaintiff, for the use and benefit of the plaintiff, not involved in certain actions at law brought by the plaintiff against the defendant. The plaintiff alleges that on or about the 4th day of June, 1866, pursuant to its charter and by-laws, the defendant was elected trustee of plaintiff for a term of four years, and that by virtue of successive re-elections thereafter he continued to hold the office and act as trustee until the 3d day of January, 1906; that on the 3d day of June, 1885, pursuant to the charter and by-laws of the plaintiff, he was elected its president for a term of one year, and thereafter, by virtue of successive annual re-elections, continued to hold office and act as president until the 29th day of November, 1905; that while

holding said offices it was his duty, under the charter and by-laws of the company, to conserve its interests and to preserve from waste the property of the company which was received by him or was under his control, and "to authorize, make, or knowingly or negligently permit to be made, no unlawful or improvident use of the funds of the plaintiff," and to exercise due care and faithfulness in the discharge of his duties, and to account to the plaintiff for its property which came into his hands or under his control; that by virtue of his office as trustee and president he personally, and through his agents, from time to time, received and acquired the custody and control in its behalf of large sums of money belonging to the company "in amounts and at times unknown to the plaintiff;" that large sums of money "so received by the defendant were taken by the defendant or caused or knowingly permitted by him to be taken from the treasury of the plaintiff through a system of false and fraudulent bills and vouchers, which system was concerted between the defendant and certain officers and agents of the plaintiff" and paid out by the disbursing officers and agents of the company with his knowledge; that by said system the defendant "caused or knowingly permitted the moneys of the plaintiff to be paid out to and received by himself or his agents and servants," and caused or knowingly permitted false and fraudulent entries to be made in the books of account of the company in accordance with the false bills and vouchers, "and not in accordance with the true disposition in fact made of the sums paid out thereon," and without vouchers therefor, "from time to time made, directed or knowingly permitted large expenditures and disbursements of or out of the moneys received by him," and "caused or knowingly permitted entry of such expenditures and disbursements to be omitted" from the books of the company; and from time to time "he delivered or caused or knowingly permitted to be delivered to one Walter R. Gillette, as his agent in the premises, large portions of the moneys received" by him by virtue of his office as president and trustee, from which Gillette from time to time, by direction of the defendant, "made large expenditures and disbursements," retaining the balance as agent of the defendant, no part of which, excepting the sum of \$8,000 voluntarily paid by Gillette to the company, has been accounted for; that many of the expenditures and disburse-



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ments "made, directed or knowingly permitted by the defendant or said Gillette" were unauthorized and were for unlawful purposes, but "as to the nature, object and amounts of the great majority of the said expenditures and disbursements or as to whether any of the said expenditures and disbursements were lawfully chargeable to the plaintiff, or as to whether any portion of the said sums received by the defendant as aforesaid" still remain in his hands or under his control, or in the hands or under the control of Gillette, or any other servant of the defendant, the plaintiff is without knowledge or information, or means of obtaining knowledge or information.

The suit being in equity against a fiduciary for an accounting, the plaintiff should not be required to make the allegations of the complaint more definite or certain with respect to the sums of money received by the defendant from time to time, or the dates of the receipt thereof, nor with respect to the trust upon which each sum of money was received. The trust is sufficiently shown. The allegations of the complaint with respect to the duty of defendant under the charter and by-laws of the company do not differ materially from the duties which would be imposed upon him by implication of law in assuming to exercise the functions of the office of trustee and president. (*Hun v. Cary*, 82 N. Y. 66.) It fairly appears that the facts are alleged as definitely as the knowledge possessed by the plaintiff enables it to state them, and that its inability to set them forth with greater precision is owing to the misconduct of the defendant in falsifying or permitting the falsification of the records, and in omitting to make or cause to be made proper entries in the books of the company. It is alleged that property of the company came into his custody or under his control, as trustee and president; that it has been withdrawn from the company by him or by his direction or with his consent, and disbursed without authority and for unlawful purposes, and that he has not accounted therefor. Even if he were not strictly a trustee in the circumstances, he owed to the company the duties of a trustee, and these allegations give a court of equity jurisdiction to require him to account for the property. (*Bosworth v. Allen*, 168 N. Y. 157; *O'Brien v. Fitzgerald*, 6 App. Div. 509; *affd.*, 150 N. Y. 572; *Mabon v. Miller*, 81 App. Div. 10.) The learned counsel for the appellant contends that each sum of money or item of property

which came into the hands of the defendant, for which he has not accounted, gives rise to a separate cause of action for an accounting as to that specific property, and he demands that the complaint be divided into as many separate causes of action as there are items of property which it is claimed were received by him and for which he has not accounted. We do not agree with this contention.

If it be an action for a general accounting by defendant concerning the property of the company which came into his custody or under his control, then it has already been established by precedent that it is a single cause of action. (*Bosworth v. Allen*, 168 N. Y. 157, 165.) The damages sustained by mere negligence could not be recovered in equity and it is not at all clear that the actions at law, to which reference is made, embrace any items for which defendant would be accountable in equity. (*O'Brien v. Fitzgerald*, *supra*; *Dykman v. Keeney*, 154 N. Y. 483; *Mabon v. Miller*, 81 App. Div. 10; *Empire State Savings Bank v. Beard*, 81 Hun, 184; *revd.*, 151 N. Y. 638.) If not, then the action is for a general accounting. Assuming, however, that by the reference to the actions at law certain items are eliminated from the accounting, it is difficult to perceive upon what theory an action for a general accounting with the exception of certain items can be deemed to state more causes of action than a complaint for a general accounting which, by not excepting any items, embraces more. The defendant held and exercised the functions of the offices continuously, and, therefore, any matters for which he was accountable to the company in equity, concerning which it desires an accounting, are properly included in a single count.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent,  
v. RICHARD A. McCURDY and ROBERT H. McCURDY, Appellants.

First Department, April 5, 1907.

**Pleading** — action against president of corporation to recover moneys obtained pursuant to conspiracy — when complaint states single cause of action.

An action at law to recover moneys wrongfully abstracted from a corporation by its president and his son acting in concert in a preconceived plan to defraud the corporation through the employment of the son on an unusual contract of agency made without authority at exorbitant commissions, etc., states but a single cause of action, although renewals of the agreements were made from time to time at increased commissions. Such acts are mere steps in the consummation of a single scheme or conspiracy to obtain moneys by fraud.

APPEAL by the defendants, Richard A. McCurdy and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1906, denying the defendants' motion to strike out as irrelevant and redundant certain matters alleged in the complaint, and to have the complaint made more definite and certain, and the statement of facts constituting the several causes of action separately stated and numbered.

*De Lancey Nicoll* [*Courtland V. Anable* with him on the brief], for the appellants.

*Joseph H. Choate* [*James McKeen* and *Joseph H. Choate, Jr.*, with him on the brief], for the respondent.

LAUGHLIN, J. :

This is an action at law to recover various sums of money, aggregating \$1,002,841.66, alleged to have been wrongfully abstracted from the plaintiff by the defendants, who are father and son, acting in concert and pursuant to a preconceived plan by which they fraudulently conspired and agreed at a time when the father was president of the company, to obtain, and did obtain, large sums of money from it for the benefit of the defendant Robert H. McCurdy, the son, through the employment of a firm of which he was a member, as an agent of the company, on an unusual contract of agency,

made without authority, by which the firm was paid exorbitant commissions grossly in excess of the fair and reasonable compensation for the services rendered, and by the appointment of the defendant Robert H. McCurdy to the office of superintendent of the foreign department of the plaintiff at an exorbitant salary, grossly in excess of the fair and reasonable compensation for the services rendered. The allegations of the complaint are sufficiently definite. Although renewals of the agreements from time to time at increased commissions are alleged, yet it is alleged that this was pursuant to the original corrupt, fraudulent agreement and conspiracy, and, therefore, they merely constituted steps in the consummation of the single scheme, plan and purpose conceived at the outset to wrongfully and fraudulently obtain the moneys from the company. The complaint states but a single cause of action to recover the moneys lost to the company through the fraudulent acts of the defendants, acting in concert in executing a preconceived conspiracy to obtain the moneys from the company wrongfully and without authority. (*People v. Tweed*, 63 N. Y. 194; *Bosworth v. Allen*, 168 id. 157, 165; *Mabon v. Miller*, 81 App. Div. 10.)

It follows that the order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent,  
v. CHARLES H. RAYMOND and LOUIS A. THEBAUD, Defendants,  
Impleaded with RICHARD A. MCCURDY, Appellant.

First Department, April 5, 1907.

**Pleading — conversion by officers of insurance corporation — when complaint should be made definite and certain.**

A complaint against the president of an insurance corporation and others which alleges that the defendants, acting jointly, wrongfully and without authority, took certain money belonging to the corporation, consisting of checks, bank bills, United States notes, treasury notes and gold and silver coins of a speci-

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fed aggregate value, and wrongfully converted the same, should be made more definite and certain when the transactions covered a period of thirteen years, for it is improbable that the conversion was a single transaction.

APPEAL by the defendant, Richard A. McCurdy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1906, denying the said defendant's motion to strike out as irrelevant and redundant certain matters alleged in the complaint and to have the complaint made definite and certain and the statement of facts constituting the several causes of action separately stated and numbered.

*De Lancey Nicoll* [*Courtland V. Anable* with him on the brief], for the appellant.

*Joseph H. Choate* [*James McKeen* and *Joseph H. Choate, Jr.*, with him on the brief], for the respondent.

LAUGHLIN, J.:

The complaint contains two counts. The first alleges a fraudulent and corrupt agreement and conspiracy between the appellant, who was president of the plaintiff, and the other defendants, who composed the firm of Charles H. Raymond & Co., the defendant Thebaud being son-in-law to said McCurdy, to enrich the firm and particularly Thebaud at the expense of the plaintiff, by which the firm was to receive and did receive, as general agent of the plaintiff, compensation at special and exorbitant rates, exceeding the fair and reasonable compensation for the services rendered or to be rendered by the sum of \$750,000, and other moneys aggregating \$500,000, for which plaintiff was to receive and did receive no consideration, to plaintiff's damage in the sum of \$1,250,000. The observations in *Mutual Life Ins. Co. v. McCurdy and McCurdy* (118 App. Div. 827), argued and decided herewith, answer the objections to the order presented on this appeal, so far as the first count of the complaint is concerned, and render further discussion thereof unnecessary.

In the second count the plaintiff alleges its incorporation and that "between the 1st day of January, 1893, and the 17th day of November, 1905, the defendants, acting jointly, wrongfully and without authority, took certain money, the property of the plaintiff,

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consisting of checks, bank bills, United States notes, Treasury notes, gold and silver coin, of the amount and value of five hundred thousand dollars (\$500,000) and wrongfully converted the same to their own use, to the damage of the plaintiff" in the sum of \$500,000. I am of opinion that this count should be made more definite and certain. It is possible that the conversion of this property constituted only a single transaction, but that is highly improbable. It is not alleged to have been converted all on the same day, but during a period covering nearly thirteen years. Various kinds of property are involved and the amount is very large. The reasonable inference is that this wrong was not a single act of conversion, but many acts at different times, quite remote and disconnected from one another. The count should, therefore, be made more definite and certain with respect to the time and with respect to whether it is claimed that the property was converted by a single act or transaction; and if there was more than one conversion, the causes of action should be separately stated and numbered.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and the motion granted as to the second cause of action as indicated in this opinion.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted as indicated in opinion. Settle order on notice.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent,  
v. ROBERT A. GRANNISS, Appellant.

First Department, April 5, 1907.

**Pleading — when motion for bill of particulars may not be united with a motion to make the complaint more definite and certain — when complaint states a single cause of action for general damages to corporation by wrongful acts or negligence of officer.**

Motions to make a complaint more definite and certain or for a bill of particulars in the alternative cannot be united, because the first may only be made before and the latter ordinarily after answer unless necessary to enable the defendant to plead.

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On a motion to make a complaint more definite and certain the court may require that allegations respecting the nature of the charge be made definite; but neither particulars nor circumstances of time or place should be required. A motion to make a complaint more definite and certain is to enable a party before pleading to ascertain the charges made against him with sufficient definiteness to enable him to plead.

A complaint in an action against the vice-president and trustee of an insurance company which alleges that the defendant was required to preserve the assets of the company and was not authorized to make unlawful or improvident use of its funds, etc., and that it being his duty to examine and approve or disapprove the vouchers for disbursements, he knowingly or negligently approved and recommended the payment of a large number of bills and vouchers which were not proper charges against the company to its damage, states a cause of action for general damage for wrongful acts or negligence as agent of the company. The amounts lost through such wrongful acts or negligence are evidence of the damage but not specifically recoverable, and the pleading need not set forth the dates or amounts of the payments or the facts in respect to each.

*It seems*, that such information, if necessary, should be obtained by a bill of particulars after issue joined.

A complaint against such vice-president and trustee which alleges that the defendant, acting in concert with other officers of the company and in disregard of his duty to preserve the property from waste, approved or participated in paying political campaign contributions wholly unauthorized, states a cause of action both for negligence and for wrongful acts as an agent of the company, and the plaintiff should not be required to make an election between the wrongs by making the complaint more definite and certain.

The above considerations also apply to a count alleging that the defendant with other officers, pursuant to a conspiracy, established a "confidential fund," which they disbursed without authority for unlawful purposes, etc.

APPEAL by the defendant, Robert A. Granniss, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of October, 1906, denying, without prejudice to an application for a bill of particulars after issue joined, the defendant's motion, made before answering the complaint, to have the complaint made more definite and certain with respect to the first, second and fifth causes of action, or, in the alternative, for a bill of particulars concerning said causes of action.

*Charles J. Fay* [*Charles D. Miller* with him on the brief], for the appellant.

*Joseph H. Choate* [*James McKeen* and *Joseph H. Choate, Jr.*, with him on the brief], for the respondent.

LAUGHLIN, J. :

The motion to make the complaint more definite and certain or, in the alternative, for a bill of particulars, were improperly joined, because one may only be made before and the other ordinarily only after pleading. Moreover, the motion having been made before defendant answered and before it was rendered certain that the material allegations of the complaint would be controverted, and a bill of particulars not having been shown to be necessary to enable defendant to plead, it was premature in so far as it demands a bill of particulars, and was, therefore, in that regard properly denied without prejudice to renewal after issue joined. (*American Credit Indemnity Co. v. Bondy*, 17 App. Div. 328.) The controlling consideration in deciding whether a complaint should be made more definite and certain is whether it contains a plain and concise statement of the facts constituting the cause of action as required by section 481 of the Code of Civil Procedure, and is prescribed in section 546 of the same Code, which authorizes the court to require a pleading, the allegations of which are "so indefinite or uncertain that the precise meaning or application thereof is not apparent," to be made definite and certain. The court may require that allegations with respect to the nature of *the charge* be made definite; but neither *particulars* nor circumstances of time and place should be required. (*Tilton v. Beecher*, 59 N. Y. 176, 183; *People v. Tweed*, 63 id. 194.) The remedy is prescribed to enable a party before pleading to ascertain the charge made against him with sufficient definiteness to enable him to properly plead.

The action is at law to recover damages for a breach or neglect of duty of the defendant as a trustee of plaintiff, a domestic life insurance corporation, holding office continuously, under six successive elections, from the 1st day of June, 1885, to the 28th day of March, 1906, and as a vice-president of plaintiff from the 16th day of December, 1885, to said 28th day of March, 1906.

Plaintiff alleges, for its first cause of action, that it was the duty of the defendant as trustee and vice-president, among other things, to preserve the assets of the company from waste, to neither authorize nor make, nor *knowingly or negligently* permit to be made any unlawful or improvident use of its funds, and to be diligent, vigilant and faithful in the discharge of his duties; that, as vice-



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president, it was his duty to examine and approve or disapprove, in writing, bills and vouchers for disbursements, and that he *knowingly or negligently* approved and recommended for payment a large number of bills and vouchers which were not proper charges against the company, to its damage in the sum of \$200,000. These facts plainly show a cause of action for general damages for wrongful acts or negligence as agent of the company; and amounts lost by the company through such wrongful acts or negligence are evidence of the damages, but are not specifically recoverable. (*Mutual Life Ins. Co. v. McCurdy*, No. 1, 118 App. Div. 815, argued and decided herewith.) It was not necessary, therefore, to allege the dates or amounts of the payments, or the facts with respect to each. That information may, in a proper case, be obtained by a motion for a bill of particulars after issue joined.

Plaintiff, for its second cause of action, further alleges that in the years 1896, 1900 and 1904, defendant, acting in concert with certain other officers of the company and in disregard of his duty to plaintiff to preserve its property from waste, approved of and participated in paying out \$92,000 of its funds for political campaign contributions, which were wholly unauthorized. These allegations show a cause of action both for mere negligence and for wrongful acts as agent of the company; and as a cause of action upon either theory might arise on those facts, plaintiff should not be required at this time, at least, to make an election by making the complaint more definite and certain. (*Mutual Life Ins. Co. v. McCurdy*, No. 1, *supra*.)

In the fifth count plaintiff *further* alleges that during the period from January, 1900, until the close of the year 1905, defendant acted in concert with certain officers of the company, who, without authority and pursuant to a preconcerted arrangement, established and maintained with plaintiff's moneys a "Confidential Fund" which they disbursed without authority and for unlawful purposes; that plaintiff *knew or should have known* these facts and that acting in concert with them he approved of and participated in the establishment, maintenance and disbursement of said fund, and neglected to perform his duty to prevent or attempt to prevent such waste of funds of the company, or to give notice to plaintiff's board of

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trustees and to its policyholders, to its damage in the sum of \$600,000. The reason already assigned for denying the motion as to the second cause of action is controlling here and leads to a like decision.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, J.J., concurred.

Order affirmed, with ten dollars costs and disbursements.

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DANIEL M. BARR, Respondent, v. CARL SCHEFER and Others,  
Appellants.

First Department, April 5, 1907.

**Contract — evidence insufficient to show contract — when error to exclude evidence that person negotiating contract was not agent of defendants — new trial granted for failure to instruct as to measure of damage.**

Evidence as to whether a contract was made with the defendants or with a third person individually considered and

*Held*, that it was insufficient to sustain a finding that the contract was made with the defendants.

When in an action for the breach of a contract the defendants contend that the contract was made with a third person who was not acting as their agent but the court charges that the plaintiff may recover either if the contract were made with the defendants or with the third person acting for them, it is error to exclude an agreement fixing the business relations between the defendants and the third person. Such error is not cured by charging in substance that the plaintiff cannot recover if the jury find that no agreement was entered into but that the jury may consider both the defendants' testimony denying the contract was made with them and the testimony as to the agency of the third person.

When in an action on the breach of a contract the court fails to give any instructions as to the rule of damages and there is no evidence specifically indicating the amount of damage, the verdict will not be affirmed but a new trial should be granted.

APPEAL by the defendants, Carl Schefer and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of

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July, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 25th day of July, 1906, denying the defendants' motion for a new trial made upon the minutes.

*George W. Schurman*, for the appellants.

*Alfred H. Holbrook*, for the respondent.

LAUGHLIN, J.:

The plaintiff is engaged in the business of manufacturing dress goods under the name of the Barr Manufacturing Company at Philadelphia, and the defendants are commission merchants doing business in the city of New York under the firm name of Schefer, Schramm & Vogel. The complaint sets forth two causes of action, one for a breach of contract in failing to turn over to the plaintiff orders for the manufacture of dress goods, taken on samples furnished by him pursuant to a contract with defendants, and the other is in tort for the alleged conversion of the samples. The plaintiff's claim under the second cause of action does not appear to have been submitted to the jury, and as it was not involved in the verdict, it requires no consideration on the appeal.

The verdict is not fairly supported by a preponderance of the evidence, and neither in the trial of the issues, nor in the submission of the case to the jury, was a definite theory developed upon which it may be said that the verdict is right. The plaintiff gave evidence tending to show that he negotiated a contract with two of the defendants verbally in the presence of Alfred P. Tannert, who was at the head of the dress goods department of the defendants. The agreement, according to the testimony of the plaintiff, was, in substance, that Tannert, representing the defendants, should furnish designs to the plaintiff, who should manufacture samples in accordance therewith and deliver them to the defendants, from which orders were to be solicited by their salesmen and forwarded to the plaintiff, who was to fill the same at a fixed price of thirty-one and a half cents per yard, and pay the defendants a commission of seven and a half per cent of the net sales. The defendants denied that the contract was made with them, and gave evidence tending to show that the plaintiff's negotiations and contract, if any, were with A. P. Tannert, who either alone or in partnership with another or others,

was doing business under the name of A. P. Tannert & Co., and who had his office with the defendants and had business relations with them, which were provided for by a contract in writing.

The contract between the defendants and A. P. Tannert was offered in evidence by defendants, but excluded on the objection of the plaintiff, to which defendants duly excepted. Other evidence offered by the defendants tends to show, in substance, that they attended to the financial part of the business conducted by Tannert & Co., guaranteeing collections to the manufacturers and collecting and remitting on orders placed and filled. After the time when, according to the testimony of the plaintiff, the parol contract was negotiated, the plaintiff wrote letters to A. P. Tannert & Co., which were introduced in evidence by defendants and tend strongly to show that he maintained and acted upon the theory that no binding contract had been negotiated with reference to the sale of the goods by sample and that he was desirous of contracting with A. P. Tannert & Co. to sell either outright for a specified price per yard for the goods which is called a merchandise basis, or on a commission basis, and that finally in delivering some of the samples he did so upon the express condition that the sales should be on a merchandise basis, which of course was a much lower rate than if on consignment. If the contract had been made with defendants, as testified by plaintiff, he would encounter difficulty in answering the claim that he was the first to break the contract.

The plaintiff contends that these letters merely indicate a desire on his part to change the contract from a commission basis to flat sales, and that they are consistent with his having previously negotiated the contract with the defendants, as testified to by him. There is no reference in the letters to any existing contract, nor to a desire to change or alter the same. The letters tend strongly to contradict the oral testimony of the plaintiff, and to show that the negotiations for the contract were between him and A. P. Tannert & Co. acting for themselves. We are of opinion, therefore, that the verdict is against the weight of the evidence, in so far as the jury have found that the contract was made with the defendants.

In the original charge the court instructed the jury that if the agreement was made by Tannert & Co. acting independently of the defendants, the plaintiff could not recover, and that in order to

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entitle plaintiff to recover, he must show that the contract was made with the defendants either directly or *with Tannert & Co. acting for the defendants*. If, as the record indicates, the theory of the plaintiff during the trial was that the contract was made directly with the defendants, then the agreement between them and A. P. Tannert was properly excluded, but in the view in which by the charge in chief the question was submitted to the jury, the authority of Tannert to represent the defendants became important, and the agreement between them should have been received. At the close of the main charge counsel for the defendants requested the court to instruct the jury that if they believed the testimony of the defendants, with whom the plaintiff testified that he negotiated the contract verbally, and who denied it, then their verdict should be for the defendants, to which the court replied: "I so charge, that is to say, if they should find no agreement was entered into. I will give them that testimony and the testimony of the other witnesses on that question."

It may be that the error in allowing the jury to find against the defendants upon the theory that the contract was made with Tannert & Co., as *their agents*, after having excluded evidence showing the authority of Tannert & Co. if any, to represent the defendants, would have been corrected, had the court granted this request unqualifiedly as made, because then the jury would only have been at liberty to find against the defendants if the contract was negotiated directly with them by the plaintiff. In view of the qualifications of the request, however, it cannot be said that the jury so understood the court.

Moreover, the court failed to give the jury any instructions with respect to the rule of damages, and the jury rendered a verdict in favor of the plaintiff for \$2,128 without evidence specifically indicating that that was the amount of damages sustained, which leaves it uncertain as to what rule of damages was adopted and followed by the jury.

Plaintiff alleged and the evidence tends to show that orders for a large quantity of goods were received on samples manufactured by the plaintiff and delivered to the defendants or to Tannert & Co., but that these orders were filled by another party. There was other evidence indicating that other damages were sustained by

plaintiff, but it was too indefinite and speculative to warrant any recovery thereon. The agreement, as proved by the plaintiff, was not for any specified period. No goods were manufactured by the plaintiff to fill any of the orders taken on the samples manufactured by him. If, as claimed by plaintiff, he manufactured and delivered samples to the defendants upon the agreement that they were to solicit and transmit to him orders thereon, it is manifest that he would be entitled to recover the difference between what it would have cost him to have manufactured the goods and the price at which the goods were to be sold as fixed in the contract, less the commissions payable to the defendants. The evidence leaves the quantity of goods for which orders were taken or filled quite uncertain. The plaintiff testified, in substance, that the cost to him of filling the orders would have been thirteen and three-tenths cents per yard for the goods in which there was no mercerized dot, and thirteen and ninety-two one-hundredths cents per yard for goods with the mercerized dot. The evidence does not clearly show what part of the orders taken or filled was for goods with or without the mercerized dot. The defendants gave evidence tending to show that the cost of manufacturing would have been twenty-two and nine one-hundredths cents per yard. The only instruction the court gave the jury on the subject of damages was, that if they found there was a contract and that the defendants were guilty of a breach thereof, the plaintiff was entitled to recover the amount of damages suffered by him which he had proved to their satisfaction. It may be that the jury adopted the correct rule of damages, but inasmuch as no rule of damages was laid down by the court, that cannot be affirmed on the verdict rendered, and the defendants are entitled to a new trial.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellants to abide the event.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellants to abide event.

CHARLES W. TREMBLEY, Respondent, v. CHARLES C. MARSHALL,  
Appellant.

First Department, April 5, 1907.

**Practice — when rival claimants to fund may be interpleaded.**

When two brokers each claim a right to commissions, and there is no pretense that the defendant is liable to both, he may, upon paying the amount into court, interplead the claimants to litigate the issues between themselves.

APPEAL by the defendant, Charles C. Marshall, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of January, 1907, denying the defendant's motion to have another person interpleaded and substituted as defendant.

*William B. Hornblower*, for the appellant.

*William H. Osborne*, for the respondent.

SCOTT, J.:

We have here presented the not infrequent case of a single sale of real property, with two brokers each claiming to have been the sole efficient cause of the sale, and, therefore, entitled to the commission. There is no pretense or suggestion that defendant has rendered himself liable to pay double commissions, and he, conceding his liability to one or the other of the claimants, but unable to determine between them, and unwilling to do so at his own risk, asks to interplead them, paying the sum claimed into court, and leaving the rival claimants to litigate over it between themselves. There is good reason and ample authority for granting his motion. (*Rasines v. Ives*, 85 App. Div. 483; *Dreyer v. Rauch*, 3 Daly, 434; *Shipman v. Scott*, 12 Civ. Proc. Rep. 109; *Bickart v. Hoffmann*, 19 N. Y. Supp. 472.)

We find no foundation in the papers for the claim that, in any legal sense, the appellant has disputed the plaintiff's claim. At the most he has expressed only an opinion that it is not well founded.

This is not sufficient to defeat his motion. The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, upon the payment into court by defendant of the amount claimed.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, upon payment into court by defendant of amount claimed.

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ARTHUR M. WERTHEIMER and ALVIN WERTHEIMER, Appellants, v.  
JAMES TALCOTT, Respondent.

First Department, April 5, 1907.

**Principal and agent — commissions of factor on damaged goods taken over by insurer — disbursements to insurance adjuster and attorney.**

When a factor's contract entitles him to a certain percentage on a sale of goods for the principal and a less percentage if the goods are not sold by the factor but are redelivered to the principal or transferred to other parties at his request, the factor is only entitled to the less percentage when the goods are damaged by fire and taken over by the insurer under an option in the policy. The factor's contract should be construed to mean that he is entitled to the higher commission only upon effecting a sale in the general course of business. The taking over of the goods by the insurer is in the nature of a transfer to third parties without sale.

But when such insurance is taken out both for the benefit of the principal and the factor, the latter is entitled to be reimbursed for reasonable fees paid to an adjuster for services rendered and for legal advice.

APPEAL by the plaintiffs, Arthur M. Wertheimer and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 1st day of June, 1904, upon the report of a referee.

*Daniel P. Hays*, for the appellants.

*Arthur C. Rounds*, for the respondent.



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SCOTT, J. :

The plaintiffs appeal from a judgment entered upon the report of a referee. The action is by a principal against his factor and involves the question as to the propriety of certain charges made by the factor.

The plaintiffs from time to time consigned goods to defendant, upon which the latter made advances and paid certain charges, being entitled, by agreement between the parties, to be reimbursed from the proceeds of sale thereof, and also to the payment of interest and of certain specified commissions. On June 26, 1900, there were in the possession and control of defendant goods consigned to him by plaintiffs, upon which he had made advances and paid charges and which he held for sale, and subject to such advances and charges

Defendant, from time to time, insured the goods consigned to him by plaintiffs against loss by fire, in his own name, but for the benefit of himself and plaintiffs according to their respective interests, the premiums therefor being paid by plaintiffs. The goods held by defendant by consignment from plaintiffs were so insured on June 26, 1900, when they were injured by fire. The loss was a very considerable one, and there were a large number of insurance companies involved. Defendant employed a firm of insurance brokers and adjusters to represent and protect his interests and those of plaintiffs, and to take such steps as might be necessary to secure an adjustment, appraisal and payment of the loss occasioned by the fire. He also employed an attorney to advise concerning certain questions of law which appeared to be involved. The proceedings looking to an adjustment of the loss proceeded until the damage to the stock of goods was fixed at \$165,407.84, and the actual cash value of the goods insured before the fire at \$230,044.97. The insurance companies elected to exercise the option reserved to them by the terms of the policies and took the entire stock of insured goods at the amount appraised as the net cash value before the fire, and paid the amount thereof to defendant, who paid over to plaintiffs or accounted to them for the whole amount received by him, excepting the sum of \$14,819.90, which constitutes the amount in controversy in this action. The defendant justifies his retention of this sum as follows :

He claims to be entitled to retain the sum of \$7,489.86, being three and one-quarter per cent upon the amount collected from the insurance companies, as commissions agreed to be paid to him upon the sale of the consigned goods. He claims to be entitled to retain \$6,830.44, the sum paid by him to the insurance adjusters employed by him, for their services in procuring an adjustment of the loss, and he claims to be entitled to retain \$500, the expense incurred for the services of the attorney retained by him to advise concerning the claims against the companies. The learned referee has found in defendant's favor upon each of the disputed items, and this appeal challenges the correctness of his conclusions and raises practically no question of fact. By the terms of this contract between the parties the defendant is made sole factor and selling agent for plaintiffs; all goods were to be consigned to defendant and sold by him, being invoiced to purchasers in the name of "James Talcott, Wertheimer & Company Department," and defendant was to pay the expense of a bookkeeper to supervise the books and accounts used in the business of the agency; defendant was also to supervise the credits, keep books of account, ledger, etc., at his main store, Nos. 108-110 Franklin street (not the place in which the goods were kept and sold), and to furnish the employees, attend to collection of accounts, correspondence and all other necessary details connected with the business (*i. e.*, at the main store in Franklin street) at his own expense. Plaintiffs were to pay all other expenses incurred in conducting the business, including the rent of any premises which might be selected for said business, salaries of salesmen and other employees (except at defendant's main office in Franklin street), stationery, postage, telegrams and all office, selling, packing, cartage, storage and incidental expenses, and premiums for insurances. Defendant was to have exclusive supervision and control of the sale of said consigned goods, and was to decide all questions as to credit to be given to purchasers.

It clearly appears from the contract as a whole that, while the legal control and constructive custody of the goods was to be in defendant, the plaintiffs and their employees were to perform the actual work, and furnish the necessary means for making sales, the defendant for the protection of his advances retaining a supervision over credits, and collecting bills when due. The clause in the

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contract respecting defendant's compensation reads as follows: "For his services as such factor and selling agent, James Talcott shall receive three and one-quarter ( $3\frac{1}{4}$ ) per cent commission to be computed upon the net amount of sales of the said consigned goods. In case all the goods so consigned shall not be sold by said James Talcott and the part remaining unsold shall be redelivered to Wertheimer & Company, or transferred to other parties at their request, whether on the termination of this agreement or otherwise, Wertheimer & Company shall pay to James Talcott for his services in connection with said unsold goods a commission equal to one and one-half ( $1\frac{1}{2}$ ) per cent of the amount of advances outstanding at the time the consignment account is closed, plus one per cent of the net market value of the said goods so redelivered or transferred."

The defendant's claim, which has been upheld by the referee, is that the exercise by the insurance companies of their option under the policies to take the whole stock of goods, paying the actual cash value thereof as it was prior to the fire, constituted a sale thereof to the companies within the meaning of the contract, and that the defendant thereupon became entitled to full commissions of three and one-quarter per cent thereon. With this view we are unable to agree. While the taking over of the whole stock by the companies comprised some of the elements of a sale, such as a transfer of title and possession, and a payment of consideration therefor, we do not consider that it amounted to a sale of the property within the meaning of the contract between the parties to this action. The contract of insurance is primarily and essentially a contract for indemnity, and while the usual form of policy leaves to the insurer an option as to the manner of making indemnity between paying the amount of damage, leaving the damaged goods to the insured, and paying the total value of the goods, and taking what is left of them by way of salvage, the contract still remains one of indemnity and not of purchase. We think that it is very evident, reading the contract between plaintiffs and defendant as a whole, that by the sales of goods upon which defendant was to receive a full commission of three and one-quarter per cent were meant and intended commercial sales in the regular course of business, for which precise and elaborate provision was made in the contract, including the services of salesmen, the packing and shipping of goods, the scru-

tiny and supervision of credits, and the discount and collection of bills. The fact is that in consequence of the fire the goods were disposed of otherwise than by such a sale as was contemplated by the contract, and for such a disposition the contract makes provision. It is provided that if unsold goods are transferred to other parties than defendant at the request of Wertheimer & Co., the defendant shall receive one and one-half per cent upon his advances, and one per cent on the net market value of the goods. It plainly appears that the plaintiffs were not only willing that the loss should be adjusted by the taking over by the insurance companies of the whole stock of goods, but preferred that method of adjustment, and their expressed desire in that regard may well be considered as equivalent to a request that the goods be transferred to the companies. We consider that the intent of the contract will be carried out if the defendant be held to be entitled to retain the percentages provided for in case the goods remaining unsold be transferred at the request of plaintiffs to other parties than defendant.

As to the fees paid to the adjusters we think that the case was rightly decided by the referee. The judgment in the action brought by the adjusters against defendant, and of which plaintiffs undertook the defense, did not perhaps determine, as between these parties, that the amount which defendant agreed to pay the adjusters was reasonable, but even if that question was left open there is nothing which requires us to hold that it was unreasonable. It was right and proper to engage the services of a skilled adjuster, and while the evidence shows that there was no fixed rule for the compensation of adjusters, and that other persons than those employed by defendant would have done the work more cheaply, it is not shown that defendant was guilty of negligence or of bad faith in employing the adjuster whom he did employ, or in agreeing with him as to the rate of compensation. We find nothing else in the case requiring discussion or criticism.

The judgment should, therefore, be so modified as to restate the account between the parties by allowing to the defendant commissions upon the amount received from the insurance companies at the rate provided for in the contract in case unsold goods shall be transferred at the request of plaintiffs to parties other than purchasers in the regular course of trade with the appropriate adjust-

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ment of interest, and as so modified should be affirmed, without costs.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

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CREMO LIGHT COMPANY, Respondent, v. FRANK M. PARKER, as Attorney in Fact and Representing All the Underwriters of ASSURANCE LLOYDS OF AMERICA, Consisting of Said FRANK M. PARKER and Others, Appellant.

First Department, April 5, 1907.

**Insurance — when fire insurance forfeited on assignment of corporate assets.**

A floating policy of fire insurance upon goods issued to one corporation is forfeited under the clause in the standard form of policy when the corporation transfers all its assets and business to a new corporation formed for the purpose of taking the assets over.

Corporations are distinct entities and such assignment is a complete change of ownership within the forfeiture clause.

APPEAL by the defendant, Frank M. Parker, as attorney in fact, etc., from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of December, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint.

*Charles E. Hill*, for the appellant.

*Allan R. Campbell*, for the respondent.

SCOTT, J.:

The action is upon a fire policy in the standard form, with the addition of the necessary clauses to fit its character as a Lloyd's policy. The defendant appeals from a judgment overruling a demurrer to the complaint. The Assurance Lloyds of America

insured "Cremo Incandescent Light Company, as now or may be hereafter constituted." It contained the usual clause that the policy should be void "If any change, other than by the death of an insured, takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise, or if this policy be assigned before a loss."

The insurance was what is known as a "floating policy" covering stock manufactured and unmanufactured in the building Nos. 108 and 110 East One Hundred and Twenty-ninth street, and the machinery, implements, furniture, etc.

The complaint, after setting forth the policy, alleges that on January 31, 1905 (during the term of the policy), plaintiff, Cremo Light Company, was organized, and among the purposes stated in the certificate of incorporation was that of purchasing the properties, franchises, good will and business of every nature and description of the said Cremo Incandescent Light Company, all of which were on February 7, 1905, duly transferred to plaintiff.

That prior to such assignment the Cremo Incandescent Company was engaged in the business of manufacturing incandescent mantels for gas burners at 108 and 110 East One Hundred and Twenty-ninth street under the management of Luther E. Hartley and Joseph Lederer.

That when plaintiff corporation was formed it succeeded to said business which continued to be conducted at the same place and in the same manner and with the same employees and under the management of said Hartley and Lederer and without any increase of hazard or risk.

That Hartley was made president of the new company, having general supervision of its affairs, and Lederer was made vice-president superintending and supervising the manufacturing. That the capital stock of the incandescent company had been \$25,000, owned entirely by Hartley and Lederer. That the capital stock of the new company was \$40,000 preferred and \$60,000 common, of which \$20,000 preferred and \$20,000 common were issued to Hartley and Lederer, the balance being issued to other persons. The company then alleges a fire loss and notice and service of proof of loss upon the underwriters.

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The only question is whether or not the transfer of all the assets and business of the incandescent company to the new company, under the circumstances, worked a forfeiture of the policy under the non-assignment clause, or whether the policy passed to the new company so as to cover not alone assets which were transferred in February, but other assets of like kind acquired by the plaintiff company since it acquired all the property of the incandescent company, for there is no allegation that the property destroyed and for which a recovery is sought was a part of the identical assets acquired from the incandescent company.

That a policy of insurance is a personal contract running to the assured and that it may not be assigned to another without the consent of the insurer is familiar law. It is equally clear that a new corporation, organized under a separate charter, is quite a different entity from a former corporation organized under a different charter, and the two corporations are still to be considered different entities, notwithstanding one may have been formed for the express purpose of taking over and may have taken over all the assets and business of the former.

If there had been merely a change in the name, personnel or ownership of the original company, the conditions of the policy would not have been violated, but in our opinion what really happened was much more than this. It was a complete change of ownership.

In *Loeb v. Firemen's Ins. Co.* (73 App. Div. 113), much relied on by respondent, the question presented here did not arise and was not considered.

The judgment must be reversed and the demurrer sustained, with costs, with leave to plaintiff to amend the complaint within twenty days upon payment of costs in this court and the court below.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to amend on payment of costs in this court and in the court below.

MARY DES MOINEAUX, Respondent, v. NEW YORK CITY RAILWAY  
COMPANY, Appellant.

First Department, April 5, 1907.

**Negligence — excessive verdict — failure to show that injuries resulted from accident.**

When in an action to recover for personal injuries, the verdict is based on a condition of hysteria in the plaintiff, and it appears that shortly prior to the accident she underwent a surgical operation which might have produced the hysteria and the only other injuries shown were trifling, the plaintiff has failed to sustain the burden of showing that the hysteria was the result of the accident, and a new trial will be granted unless the plaintiff reduce the judgment.

APPEAL by the defendant, the New York City Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of October, 1906, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 22d day of October, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Bayard H. Ames*, for the appellant.

*Grant C. Fox*, for the respondent.

SCOTT, J.:

In this action for injuries received in consequence of a collision between two of defendant's cars, the appellant admits its liability for whatever injuries resulted from the collision, questioning only the amount of the recovery.

Plaintiff was a married woman of about thirty-two years of age. Her strictly physical injuries were slight, but shortly after the accident she developed a condition of hysteria which was serious and continued down to the date of the trial, and, as was testified to, would probably continue for some time thereafter. The question principally litigated was whether or not this condition resulted from the accident, or from an operation to which plaintiff had submitted a few weeks prior to the accident.

On October 3, 1903, plaintiff was operated on at the Flower



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Hospital in the city of New York and important organs of her body were removed. On October thirtieth she was discharged from the hospital and on November ninth met with the accident for which she sues. A curious, and perhaps significant fact is, that when defendant's physician examined the plaintiff on June 4, 1904, about seven months after the accident, in the presence of her husband and the physician who had operated on her, nothing whatever was said about the operation which plaintiff had undergone, and many of the symptoms testified to and dwelt upon at the trial were not referred to. This circumstance suggests either that the plaintiff desired to mislead the defendant as to the extent of her injuries, or that she had not at that time determined to assert her present claim that the accident alone was responsible for her condition of hysteria. The result of the medical testimony, as we read it, was that it was at least as probable that plaintiff's hysterical condition resulted from the operation as that it resulted from the accident, and we do not consider that she sustained the burden of proving by a fair preponderance of evidence that her serious condition was the result of the accident, and not of the operation.

If her hysteria did in fact result from the accident the verdict was none too large. If it did not, her other injuries would be liberally compensated by a much smaller verdict.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event, unless the plaintiff shall stipulate to reduce the judgment to \$1,135.45, in which case the judgment as modified should be affirmed, without costs to either party.

MCLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred; PATTERSON, P. J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as stated in opinion, in which event judgment as so modified and order affirmed, without costs. Settle order on notice.

JAMES A. GRANT and NETTIE L. GRANT, Appellants, v. WILLIAM C. GREENE, Respondent, Impleaded with GREENE CONSOLIDATED COPPER COMPANY and Others, Defendants.

First Department, April 5, 1907.

**Deposition — examination of party before trial — reference to unverified complaint — when moving affidavit sufficient.**

Although under the present rule in the first department a party, in the absence of bad faith or abuse of process, is entitled to examine his adversary before trial as to facts which are material to the issue of which he has knowledge and to take his deposition for use on the trial, yet on the application it must be shown that material issues are involved of which the party sought to be examined has knowledge, and this must be established not by mere assertion of the affiant's conclusions but by allegations of facts from which the justice to whom the application is made can himself draw the necessary conclusions.

The affidavit in order to establish the nature of the action and the claims which the plaintiff asserts may make reference to an unverified complaint which is attached to and made part thereof.

In a stockholder's action to obtain a decree adjudging that another corporation holds legal title to property in trust for the stockholder's company and for an accounting, an examination before trial of the officer of the alleged trustee may be had when the complaint shows that the plaintiff may not be able to secure his attendance at trial; that he is the only living person having full knowledge of the facts necessary to prove the plaintiff's case; that although he has been examined in other actions and has made admissions which go to prove the allegations of the complaint, such admissions cannot be used against the other defendants, and that he has knowledge of the specific facts and circumstances as to which the examination is sought, etc., and that the plaintiffs intend to call him on trial as their principal witness.

The affidavit on an application for examination of a party before trial need only allege the necessary facts; it need not state the evidence tending to prove those facts.

APPEAL by the plaintiffs, James A. Grant and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of February, 1907, vacating a prior order for the examination of the defendant William C. Greene before trial.

*Walter B. Raymond*, for the appellants.

*M. E. Harby*, for the respondent.

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SCOTT, J. :

The plaintiffs appeal from an order vacating an order for the examination of the defendant William C. Greene as a witness before trial. The learned court below, recognizing the liberal rule now in force in this department respecting such examinations, still was of the opinion that in this case the affidavit of the plaintiff did not sufficiently state the essential facts to sustain an order for examination. It is quite true that, as usual in this litigation, the papers are voluminous and many of the allegations are argumentatively stated, but it is possible to extract from the affidavit upon which the order of examination was granted all the necessary facts to sustain the order. *First.* The nature of the action is stated. This is done by a reference to the complaint which is attached to and made part of the motion papers. This complaint is unverified, and while the reference to it in the affidavit is not equivalent to a verification so as to permit the complaint itself to be read and considered as an affidavit, yet such a reference is equivalent to a statement in the affidavit of the cause of action and the claims which the plaintiffs assert. *Second.* Certain facts are recited tending to show that it is quite probable that plaintiffs may not be able to secure Greene's attendance at the trial. *Third.* That Greene is the only person living who has a full and complete knowledge of all the facts necessary to prove plaintiffs' cause of action. *Fourth.* That Greene has been examined exhaustively in various actions and proceedings concerning many of the transactions set forth in the complaint and has made several admissions and statements which will go far to prove the allegations of the complaint, but for certain reasons such examinations, admissions and statements cannot be used at the trial of this action against the defendants other than said Greene. *Fifth.* That Greene has knowledge of the specific facts and circumstances as to which an examination is sought; that he was the original owner of the mines involved in the litigation, or of options upon them; was one of the organizers and directors of the Cobre Grande Copper Company; personally conducted negotiations with one Lawson and one Addicks named in the complaint; was president of the Cobre Grande Copper Company; was president and organizer of the Greene Consolidated Copper Company and the Cananea Consolidated Copper Company, with which corporations he has been identi-

fied since their organization either as officer or director. *Sixth.* That plaintiffs intend to call said Greene upon the trial as one of their principal witnesses.

The present rule in this department is that, in the absence of bad faith or abuse of process, a party to an action is entitled to examine his adversary before trial as to facts which are material to the issues and of which he has knowledge, and to take his deposition for use on the trial; and it is no answer to such an application that the party making it can procure the evidence from other persons, or could subpoena his opponent for the trial. (*Goldmark v. U. S. Electro-Galvanizing Co.*, 111 App. Div. 526; *McKeand v. Locke*, 115 id. 174.) It is still necessary, however, to show that material issues are involved, of which the party sought to be examined has knowledge, and this must be established not by mere assertion of the affiant's conclusions to that effect, but of facts from which the justice to whom application is made can himself draw the necessary conclusions.

The action is one by stockholders of the Cobre Grande Copper Company to procure a decree adjudging that the Cananea Consolidated Copper Company, a Mexican corporation, holds the legal title to certain mines and mining properties in the Republic of Mexico in trust for the Cobre Grande Copper Company, and for the purpose of compelling the defendants William C. Greene, the Greene Consolidated Copper Company and the Cananea Consolidated Copper Company to account for and pay over to the Cobre Grande Copper Company the benefits and profits derived from said mines and mining properties.

An examination of the complaint shows that in order to establish the cause of action therein alleged it will be necessary to prove a long course of dealing between the several corporations, in all of which, as it is alleged, the defendant Greene took a very active part. If it be true, as affirmed by the affiant, and it is not denied, that Greene held the relations to the several defendants that are set forth in the affidavit, the conclusion is irresistible that he must have knowledge of and can testify to many of the transactions set forth in detail in the complaint, and a perusal of the complaint in connection with the recital of his intimate connection with the defendant corporations is quite sufficient to satisfy the court, in the absence of any denial of

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knowledge, that his testimony will be material and that he has knowledge of the facts, or some of them, which the plaintiffs wish to prove. The respondent criticises the affidavit because, as it is said, it states only conclusions and not facts. Certainly Greene's connection with and relations to the various companies are stated as facts, and it is from these connections and relations that we are entitled to draw the inference as to his knowledge. If the point of the criticism is that the affiant does not state the evidence tending to prove the facts, the answer is that this is not required.

Our conclusion is that the order for examination was properly granted, and the order vacating it must be reversed, with ten dollars costs and disbursements, and the motion to vacate denied, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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JAMES A. GRANT and NETTIE L. GRANT, Respondents, v. GREENE CONSOLIDATED COPPER COMPANY, Appellant, Impleaded with WILLIAM C. GREENE and Others, Defendants.

First Department, April 5, 1907.

**Deposition — examination of party before trial cannot be used to obtain due service on codefendant — practice — nature of *ex parte* motion not changed by informal appearance of respondent.**

A plaintiff is not entitled to the examination of the officers of a defendant corporation before trial for the mere purpose of finding out upon whom the summons can be served to obtain jurisdiction of another defendant corporation. When on an *ex parte* application to vacate an order for the examination of a defendant before trial, the court requires the defendant to give informal notice to the plaintiff, the motion is not turned into one made upon notice so that the refusal of the justice to vacate the order *ex parte* is a bar to a subsequent motion upon formal notice.

APPEAL by the defendant, the Greene Consolidated Copper Company, from an order of the Supreme Court, made at the New York

Special Term and entered in the office of the clerk of the county of New York on the 12th day of January, 1907, denying the said defendant's motion to vacate a prior order for the examination of the directors of the appellant company.

*M. E. Harby*, for the appellant.

*Walter B. Raymond*, for the respondents.

SCOTT, J.:

This is an appeal from an order denying a motion upon notice to vacate an order for the examination of the officers of the Greene Consolidated Copper Company concerning "the names and addresses of the officers and directors of the defendant Cobre Grande Copper Company," a codefendant. The affidavit of Nettie L. Grant sets forth: *First*, that the persons to be examined were officers of the Greene Consolidated Copper Company. *Second*, that a majority of the stock of the Cobre Grande Company is owned by the defendants, and that company is controlled by said defendants. *Third*, that plaintiff has been unable to ascertain the name of any officer of the Cobre Grande Company upon whom process can be served, and the Greene Consolidated Copper Company has refused any information. *Fourth*, that the testimony of the persons mentioned in the order is material and necessary to plaintiff in order that she may ascertain the names of the officers of the Cobre Grande Company upon whom service of a summons in this action may be made. In short, plaintiff desires to examine the officers of one defendant, not for use upon the trial nor to prove any allegation of the complaint, but to find out upon whom she can serve a summons in order to bring another defendant into jurisdiction.

We are aware of no provision of statute, and are referred to none, authorizing an examination for that purpose, and it was distinctly held in *Dudley v. N. Y. Filter Mfg. Co.* (80 App. Div. 164) that such an examination could not be held merely to enable a party to prepare for trial, but only when it fairly appears that it is the intention of the party to use the examination upon the trial. Here the contrary distinctly appears. There is no force in the suggestion that the refusal of the justice who made the order for examination to vacate it *ex parte* was a bar to this motion made on notice. It is

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true that when appellant applied *ex parte* for the vacation of the order to the justice who granted it, it was instructed by him to invite the respondent's attorney to submit his views, and, as courtesy required, it did informally inform its opponents that such an *ex parte* application was pending and would be considered by the justice at a certain time. This did not suffice, however, to turn the motion into one made on notice. The application remained, none the less, an *ex parte* one, and the order denying the application, whatever its form, can only be regarded as an *ex parte* order, not conclusive upon the appellant, as a bar to a formal motion to the court upon proper notice.

The order must be reversed, with ten dollars costs and disbursements, and the motion to vacate granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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CHARLES N. SWIFT, Respondent, v. UNITED STATES REGULATION FIRE ARMS COMPANY, Appellant.

First Department, April 5, 1907.

**Principal and agent — contract to procure legislation — when plaintiff not procuring cause of appropriation.**

In an action to recover commissions upon moneys paid by the Federal government for the infringement of patents, it appeared that the plaintiff sought to recover upon a verbal contract made in 1879 to procure legislation appropriating money for the infringement; that thereafter, in 1881, a written contract to the same effect was made by the defendant limiting plaintiff's services to a particular session of Congress; that the actual appropriation made in 1902 was due to the solicitation of a person with whom the plaintiff was unconnected.

Upon the whole evidence,

*Held*, that the plaintiff was not the procuring cause of the appropriation and his complaint should have been dismissed.

APPEAL by the defendant, the United States Regulation Fire Arms Company, from a judgment of the Supreme Court in favor

of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of October, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of October, 1906, denying the defendant's motion for a new trial made upon the minutes.

*Hamilton R. Squier*, for the appellant.

*Edward A. Alexander*, for the respondent.

SCOTT, J. :

Plaintiff sues upon two causes of action: *First*. Upon a verbal contract said to have been made in 1879, whereby he agreed "to employ his efforts and use his best endeavors in a lawful manner to have the Congress of the United States pass an act making an appropriation for the defendant for damages which it had sustained by reason of the United States infringing certain patents which were owned or controlled by the defendant;" and that defendant agreed, in consideration of plaintiff's aforesaid agreement, to pay and allow to plaintiff twenty per cent of any and all sums obtained from the government of the United States pursuant to any act of Congress which the plaintiff would lawfully procure to be passed, or which would be passed through his efforts in urging the defendant's claim as aforesaid. He further alleges that he performed the contract on his part, and that in or about the year 1902, through the lawful efforts and endeavors of the plaintiff, Congress appropriated \$25,000, which was paid to defendant. *Second*. Upon a *quantum meruit* for services performed and moneys expended at request of defendant, from January 1, 1878, to the year 1901, the service being valued at \$4,150 and the disbursements fixed at \$3,300.

It is a little difficult to understand all that this second cause of action is intended to cover. It appears to include the services contemplated by the contract set up in the first cause of action, and some disbursements incurred in various other matters. It is not very important, however, because all the items, or nearly all, are barred by the Statute of Limitations which defendant pleads, and no competent proof was offered as to any of them. The court did, however, instruct the jury that they might allow plaintiff \$1,800 for disbursements in addition to twenty per cent of the amount col-



lected from the government, and this they did allow, although it is quite impossible to ascertain from the evidence how this \$1,800 was arrived at. The plaintiff testified that the verbal contract set out in the complaint was made in behalf of defendant in 1879 by a Mr. Compton, who plaintiff at first says was then president of the company, although the fact is that he was then secretary, becoming president later. He says that this was the only contract he had, and upon which he now claims, and that Compton, after he became president, renewed, or rather recognized it from time to time.

On the trial the plaintiff amplified his statement of the contract somewhat by testifying that Compton agreed to pay him not only twenty per cent of the amount collected, but also his expenses. The plaintiff's testimony on this subject is very confused, and in one place he apparently says that the agreement was to pay him twenty-five dollars a week for expenses while he was in Washington, and that that was paid him.

He testified positively that this same contract was in force all the time he was in Washington, but it was shown that in 1881 a written contract was made, covering the subject between defendant on the one hand and plaintiff and one Hanning on the other, which was limited to the Forty-eighth Congress, and provided for a payment of twenty-five per cent of the amount allowed by Congress, or by the Court of Claims under an act to be passed by Congress.

Under this contract plaintiff and Hanning were, at their own expense, to use every fair and legal means towards obtaining the passage of a bill for the relief of defendant, with the understanding that if the bill failed at the Forty-eighth Congress the agreement was to be void.

In point of fact plaintiff never secured the passage of a bill. He went to Washington to promote its passage pretty regularly until 1883. He did nothing between 1883 and 1897 except that he went to Washington two or three times on his "own hook," as he expressed it, and after 1897 apparently ceased his efforts. Later the defendant employed a Mr. Creecy of Washington, through whose efforts a bill was put through and the money collected. Plaintiff had nothing to do with Creecy, except that he says that he advised his employment by defendant.

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It is perfectly clear upon his own story that plaintiff should not have been allowed to go to the jury — much less should a verdict in his favor have been allowed to stand.

Upon his own story his right to compensation was dependent upon his success, and he never succeeded. Having arrived at this conclusion it is unnecessary to consider the question suggested by defendant as to the validity of the contract.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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THERESA NICHOLSON, Respondent, v. NEW YORK CITY RAILWAY COMPANY, Appellant. (Action No. 4.)

First Department, April 5, 1907.

**Railroad — penalty for refusing transfer — when plaintiff not entitled to recover.**

The penalty for refusing a transfer on street surface railroads in the city of New York imposed by section 104 of the Railroad Law is designed to promote the public convenience, and not to put money in the pocket of an individual who does not come fairly within the provisions of the statute. Thus, when it is admitted that the plaintiff became a passenger for the sole purpose of bringing action for the penalty, she is not entitled to recover. Under such circumstances she is not a party "aggrieved" within the meaning of the statute.

APPEAL by the defendant, the New York City Railway Company, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 14th day of February, 1907, affirming a judgment of the Municipal Court of the city of New York in favor of the plaintiff entered on the 2d day of October, 1906, upon the decision of the court.

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*James L. Quackenbush*, for the appellant.*E. V. R. Ketchum*, for the respondent.

McLAUGHLIN, J. :

This action was brought in the Municipal Court of the city of New York to recover a penalty of fifty dollars for the defendant's refusal to furnish the plaintiff a transfer between different lines of its street surface railroads in the city of New York in alleged violation of section 104 of the Railroad Law (Laws of 1890, chap. 565, § 105, as renumbered and amd. by Laws of 1892, chap. 676.)

Upon the trial, at the close of plaintiff's case, the defendant moved that the complaint be dismissed upon the ground, among others, that the plaintiff, at the time the transfer was refused, was not a passenger in good faith seeking to be transferred to a connecting line of defendant's road; that, on the contrary, the fact was uncontradicted that her sole purpose in asking for a transfer was to bring an action to recover the penalty in case of its refusal. The motion was denied and the defendant, after offering in evidence the record in another case tried immediately preceding this one, rested, and renewed the motion to dismiss. The motion was denied and judgment rendered in favor of the plaintiff for the penalty, together with the costs, from which the defendant appealed to the Appellate Term. There the judgment was affirmed, and, by permission, the defendant appeals to this court.

I am of the opinion that the determination of the Appellate Term and the judgment of the Municipal Court should be reversed and a new trial ordered. The section of the statute above referred to and which is relied upon as a justification for the maintenance of this action, reads as follows: "Every such corporation entering into such contract, shall carry or permit any other party thereto to carry, between any two points on the railroads or portions thereof embraced in such contract, any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall, upon demand and without extra charge, give to each passenger paying one single fare, a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to

the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village." The purpose of this statute is set forth in it. It is to promote the public convenience, and that this may be accomplished it directs that the railroads embraced in any contract referred to therein shall be operated substantially as a single road with a single rate of fare. The "public convenience" has reference manifestly to passengers traveling in good faith. This is apparent from the statute itself, because it commands that the railroad shall carry for a single fare between any two points on its roads "any passenger desiring to make one continuous trip between such points." The plaintiff, therefore, in order to maintain the action, had to prove that she became a passenger in the first instance in good faith and for the purpose of going to some point on the line to which she wished to be transferred. She not only failed to prove this fact, but her counsel frankly conceded at the trial, as he did upon the oral argument of the appeal in this court, that her sole purpose in becoming a passenger was to bring an action for the penalty provided in the statute. Obviously, under such circumstances, the action cannot be maintained.

It will be noticed that only a passenger who has been "aggrieved" can maintain an action to recover the penalty. The plaintiff was not "aggrieved." Indeed, she would have been disappointed had she received the transfer demanded, because in that event the purpose of her taking the car would have been frustrated. The object of the statute, as already indicated, is to promote the public convenience. It is not to put money in an individual's pocket, unless such individual comes fairly within the provisions of the statute, viz., a passenger in good faith who has been aggrieved by the railroad company's refusal to give a transfer to some point on a connecting line to which he desires to go. (*Myers v. Brooklyn Heights R. R. Co.*, 10 App. Div. 335; *Southern Pacific Co. v. Robinson*, 132 Cal. 408; *Jolley v. Chicago, M. & St. P. R. Co.*, 119 Iowa, 491.)

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In *Myers v. Brooklyn Heights R. R. Co.* (*supra*) the precise question here presented was considered and a similar conclusion reached. The construction there placed upon the statute was binding upon the Appellate Term and might well have been followed, but it was not — presumably because the court was of the opinion that it was controlled by *Fisher v. N. Y. C. & H. R. R. Co.* (46 N. Y. 644), but in the *Myers* case the reason why the *Fisher* case did not apply to an action brought to recover a penalty under section 104 of the Railroad Law was pointed out. The statute upon which the *Fisher* case rested (Laws of 1857, chap. 185) is materially different. That act provides that “any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same.” Not a word is said in that statute about a passenger, but it is *the party* paying the excess of fare who may maintain the action. Here, the present statute is not only limited to a passenger, but to one who *desires* to go to some point on the connecting line. The statute, therefore, as it seems to me, by express provision precludes one from suing for a penalty who has no intent to go to a point on the connecting line, but who takes the car merely for the purpose of putting himself in a position to bring an action.

The determination of the Appellate Term and the judgment of the Municipal Court must, therefore, be reversed and a new trial ordered, with costs to appellant to abide event.

PATTERSON, P. J., HOUGHTON, SCOTT and LAMBERT, JJ., concurred.

Determination and judgment reversed, new trial ordered, costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ELISE  
HOFFMAN, Appellant.

First Department, April 19, 1907.

**Crime — maintaining public nuisance — house for abortion.**

It is a nuisance for a person by public advertisement to invite and receive persons in a house for the purpose of abortion and a conviction may be had under sections 385 and 387 of the Penal Code, although the crime of abortion is governed by section 294 of that Code.

Maintaining such an institution is an offense against public decency, apart from the crime of abortion.

APPEAL by the defendant, Elise Hoffman, from a judgment of the Court of Special Sessions of the City of New York, First Division, rendered on the 3d day of January, 1907, convicting the defendant of the crime of maintaining a public nuisance.

*August P. Wagener*, for the appellant.

*E. Crosby Kindleberger*, for the respondent.

LAMBERT, J. :

The defendant was charged with maintaining a public nuisance under the provisions of sections 385 and 387 of the Penal Code. An examination of the record shows that there was a fair trial, and that the judgment of conviction rests upon sufficient and competent evidence of the facts set forth in the information. The appellant insists that no crime under section 385 of the Penal Code was stated in the information, and that, therefore, the motions on the opening and closing of the case and in arrest of judgment should have been granted. This seems to be the only question requiring consideration.

The section of the Code concerned, so far as it is involved on this appeal, defines a public nuisance to be "A crime against the order and economy of the State, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission : 1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons ; or 2. Offends public decency." The facts set forth in the information and supported by the evidence show that the defendant advertised in the public newspapers

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of the city of New York to the effect that she cured "Irregularities, or no charge; longest cases; ladies boarded; 213 East 78th Street;" that she received into the house above indicated a large number of women who were with child, and that she used instruments in producing abortions. There is no attempt to dispute that the defendant made admissions of this character to the witnesses called by the People, but it is urged on the part of the defendant that as section 294 of the Penal Code makes abortion a crime of a high character there was no jurisdiction in the trial court of the offense charged as a public nuisance. Great reliance is placed upon the fact in support of this contention, that no adjudicated case has been found in which it has been held that the maintaining of a house for the purpose of practicing the vocation of an abortionist constitutes a nuisance. It is true, as a general proposition, that if a house is so kept that no one outside of its inmates is disturbed, annoyed or corrupted in their morals, it is not in law a disorderly house. The annoyance or corrupting influence must reach beyond the inmates and affect the public peace or morals of the community (1 Bish. Crim. Law [3d ed.], § 1051), but the same author says that this doctrine should "not be so applied as to exempt any man from indictment whose home is practically set open to the public, alluring the young and unwary into it for the purpose of there indulging in anything corrupting to their virtue or sobriety or general good morals. If a man would shield himself from indictment when he allows wicked and corrupting practices within his house he should keep his doors, while those practices are carried on, closed to the outer world." (§ 1053.) Again, this same learned author says: "If a house is of common resort for the commission of petty offences against the laws, such as offences punishable by fine, it is indictable on this ground, though not otherwise disorderly." (§ 1055.) In the following section he declares that this principle is as old as the law itself; that "A man who holds out inducements for people to congregate, and together commit violations of a statute, not only lends the concurrence of his will to their wrongful acts, but also does what most powerfully tends to disrobe the body politic of her virtue, and of the drapery of that order which the hand of government has thrown around her." In section 1057 he continues. "To bring a case within this principle the par-

ticular acts must be either indictable or in some sense unlawful. Therefore, the English court quashed an indictment which charged one with converting a house into a hospital for taking in and delivering lewd, idle and disorderly unmarried women, 'who, after their delivery, went away, and deserted their children, whereby the children became chargeable to the parish.' 'By what law,' asked Lord MANSFIELD, 'is it criminal to deliver a woman when she is with child?'" In this there is a clear intimation that the indictment would have been good had it charged that the house was used for the crime of abortion rather than the lawful delivery of children.

Construing the provisions of the Penal Code under which this charge is made in the light of the common law, it is only a just construction to hold that the broad language used embraces the offenses of the common-law rule. As before seen, the section defines a nuisance to consist in unlawfully doing an act which annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons, or offends public decency. This surely is as broad and inclusive in terms as the rule of the common law, which has been made the subject of the Code provisions. At common law it would have been, and under the Code provisions it is, a nuisance for a person, by public advertisement, to invite and receive a class of the public to his premises for the purpose of violating the laws of the State, as was done in this case. This, in our opinion, constitutes "crime against the order and economy of the State" by offending "public decency." It is the duty, therefore, of this court, in accord with law, to sustain this conviction. The offense of abortion is one thing; that of maintaining premises open to the public for the purpose of consummating that crime is another and separate offense against the peace and good order of the State. It is an inducement to moral laxity and to crime, and is within the letter and spirit of the sections of the Penal Code here under consideration.

No errors prejudicial to the defendant appearing in the record, the judgment of conviction is affirmed.

PATTERSON, P. J., INGRAHAM, CLARKE and HOUGHTON, JJ., concurred.

Judgment affirmed.



In the Matter of the Application of THE CITY OF NEW YORK, Appellant, Relative to Acquiring Title to Certain Uplands, etc., for the Improvement of the Water Front of the City of New York on the North River between West Eighteenth and West Twenty-third Streets, etc.

WILLIAM P. COLLINS and FREDERICK P. COLLINS, as Executors, etc., of WILLIAM COLLINS, Deceased, Respondents.

First Department, April 19, 1907.

**Eminent domain—condemnation of leasehold interest—when tenant entitled to compensation for fixtures taken.**

On the condemnation of property, a tenant under a lease entitling him to renewals is entitled to compensation for the taking of such permanent machinery as has been built into the building and used in connection with the leasehold for business purposes and which has little or no value when separated from the property.

A tenant's right of renewal is appurtenant to the property and when destroyed on condemnation the tenant is entitled to compensation therefor.

On condemnation commissioners should specify in their report the specific property for which the award is made.

APPEAL by the petitioner, The City of New York, from certain portions of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of April, 1906, confirming the report of commissioners of estimate and assessment in the above-entitled condemnation proceeding.

*Theodore Connolly*, for the appellant.

*Joel J. Squier*, for the respondents.

INGRAHAM, J.:

The question presented upon this appeal, which is from an order confirming the report of the commissioners of estimate and assessment, is as to the value of certain property taken in this proceeding; the commissioners have included in their award the value of certain machinery, which it is claimed were fixtures and a part of the real property

taken. The real property was owned by the General Theological Seminary, who had leased it to William Collins, who constructed a building upon the property, placing in it certain machinery for the manufacture of boilers, tanks and machinery, about November 1, 1883. When evidence of the value of this machinery was sought to be interposed before the commissioners, it was objected to by the city on the ground that the city was not acquiring and has not acquired any of the articles for which an award was asked. This machinery all seems to have been built into the building or constructed upon foundations built into the ground, and connected with shafting which was connected with either steam or Croton water pipes. It seems to have been appropriate and proper for the uses to which the property was put by the tenant. Some of this machinery could have been removed from the building without serious injury to the freehold. The lease of this property was dated January 11, 1882, and was for twenty-one years to March 1, 1903. It contained a provision that the tenant should, within the first year of the term, build a good and substantial house at least two stories in height upon the property, and the landlords covenanted that at the expiration of the term they would, at their option, either grant to the tenant a new lease for a further term of twenty-one years, at a rent then to be fixed, or pay to the tenant the just and fair value, to be ascertained, of any house or houses to be built which would then be standing on the premises; the renewal lease to contain a covenant for a further renewal of twenty-one years at a rent to be ascertained; the rent for these renewals to be six per cent upon the estimated value of the lots as vacant property.

I think on the condemnation of property the owners of the buildings and leasehold are entitled to be paid the fair market value of the buildings as they exist, together with such permanent machinery as has been built into the buildings and used in connection with the leasehold estate for business purposes. It is apparent that in these leases, especially from ecclesiastical corporations, the lessee obtains a substantial right in the covenant of renewals which becomes an appurtenance to the property and which is necessarily destroyed by the condemnation of the property for public improvement. This machinery was used in connection with the building which belonged to the tenant. It would be manifestly unjust to

treat such property as personal property when its value after it was severed from the building would be a very small percentage of its value as a part of the building for the use of the tenants in the business which they were conducting. Assuming that if the landlord elected to purchase the building under the provisions of the lease, it would not be required to pay for such property and the tenant would be required to remove it, when the city condemns the property it takes from the tenant the building of which this machinery is a part, and it is only just that the tenant should be paid what the building as a whole is worth. What the tenant is entitled to is the fair market value of the property that is taken. That property is the value of the leasehold, which includes the probability of a renewal of the lease which would result in his being allowed to continue as lessee and use all of this property in connection with the building, and it seems to me, in view of this right that the tenant had in connection with his occupation of the property, that justice requires that the city should pay him for the property which is a part of the building and which has little or no value separated from the property which the city takes for its own purposes.

As to such personal property as can be readily removed and would have a substantial value disconnected from the building this rule would not apply, but as far as the property has become a real part of the building constructed for the particular use to which it is put by the tenant it seems to me that the tenant is entitled to what that property in use in connection with his leasehold is reasonably worth. That is the only way in which justice can be done to tenants occupying property of this kind who have erected a building and installed in it permanent machinery for use in the building and which is of little value disconnected from the use to which the property is put. As I view it the tenant is entitled to receive the fair value of the leasehold as it exists at the time title is acquired by the city. The particular property to be included in such an award must necessarily depend upon the character of the building, the character of the machinery and of the business carried on, and while much of this machinery may be old and antiquated if removed, so as to be then of little value, it is valuable for use by the tenant as a part of his leasehold interest in the property and his ownership of the building in which it was installed. As between

landlord and tenant the tenant is allowed to remove fixtures annexed to the freehold, but it is only as between landlord and tenant that the rule of the common law, that anything that was annexed to the freehold by a substantial connection becomes a part of the realty, has been relaxed. The city is not the landlord, and as against the tenant has not acquired the landlord's rights, but is taking this property against the wish of both the landlord and the tenant for its own purposes. The rule that exists as between landlord and tenant, which has been evolved by the courts to prevent injustice to the tenant, should not be applied so that a beneficial use of the property is taken from the tenant without making him a fair compensation for the property as a whole.

The commissioners had the advantage of seeing the property and the method of its connection with the building, of hearing the testimony of the experts in relation to it and its value, and as their award does not appear to be at all exorbitant, I do not think that we should interfere with it. The representatives of the city requested the commissioners to specify in their report just what property it was for which they had made an award, and I think that request should have been granted. In a case of this kind it is essential for both parties that there should be a definite statement of just what property was included in an award, as it is only the property for which an award is actually made that vested in the city; but I do not think, in this case, that we would be justified in reversing the order to have such a statement inserted in the report, as the property for which the tenants made their claim was specified, and both parties clearly understood what property was considered and for which the commissioners have made an award. The city will be entitled to the building, including this machinery, which was specified in the testimony of the experts as a part of it, and I do not see how there can be any confusion as to just what property was acquired in the proceeding.

It follows that the order appealed from should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., CLARKE, HOUGHTON and LAMBERT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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First Department, April, 1907.

In the Matter of the Transfer Tax upon the Estate of ELIZA WHITE, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;  
FREDERICK K. DAY, as Executor, etc., of ELIZA WHITE, Deceased,  
Respondent.

First Department, April 5, 1907.

**Tax — bequests to McAuley Mission subject to taxation.**

The McAuley Water Street Mission, originally organized under chapter 319 of the Laws of 1848 and now subject to the provisions of the Membership Corporations Law, is not a religious corporation or a corporation "organized exclusively for Bible and tract purposes," and bequests to it are subject to a transfer tax.

The status of a corporation is to be determined by the statute under which it is incorporated and not by the nature of the acts it assumes to do thereunder.

(Per INGRAHAM and SCOTT, JJ.): Although the purposes of the McAuley Mission, as stated in its certificate of incorporation, would make it a religious corporation, not being incorporated under the Religious Corporations Law, it is not entitled to exemption from taxation under section 221 of the Tax Law.

APPEAL by the Comptroller of the State of New York from an order of a Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 5th day of November, 1906, reversing so much of an order entered in said Surrogate's Court on the 5th day of October, 1906, as fixed a tax upon a legacy under the will of Eliza White, deceased, to the McAuley Water Street Mission.

*George M. Judd*, for the appellant.

*John W. Boothby*, for the respondent.

LAUGHLIN, J. :

The transfer tax appraiser decided that the legacy was subject to the transfer tax, and on his report the surrogate entered a formal order fixing the tax, the amount of which is not in dispute. The executor of the testatrix then appealed to the Surrogate's Court, and the order was reversed upon the ground that the legacy was not taxable.

The will contains two bequests of *money* to the McAuley Water Street Mission. The sole question presented by the appeal is

whether these bequests are exempt from taxation under section 221 of the Tax Law,\* which, so far as material to the appeal, then provided as follows :

“ \* \* \* But any property heretofore or hereafter devised or bequeathed to any person who is a bishop or to any religious corporation, including corporations organized exclusively for bible or tract purposes, shall be exempted from and not subject to the provisions of this act. There shall also be exempted from and not subject to the provisions of this act personal property other than money or securities bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women or for charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, cemetery or historical purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, and used exclusively for carrying out one or more of such purposes.”

The McAuley Water Street Mission is a domestic corporation and it was duly incorporated under and pursuant to the provisions of chapter 319 of the Laws of 1848, entitled, “An act for the incorporation of benevolent, charitable, scientific and missionary societies,” which, with the exception of section 6 thereof, was thereafter repealed by the Membership Corporations Law, being chapter 559 of the Laws of 1895. By virtue of the provisions of section 2 of the Membership Corporations Law, all corporations organized pursuant to the provisions of the laws thereby repealed, thereupon became membership corporations.

There is no doubt but that the real and personal property of the McAuley Water Street Mission is exempt from general taxation by virtue of the provisions of subdivision 7 of section 4 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1903, chap. 204), which provides as follows :

“7. The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library,

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\* See Laws of 1896, chap. 908, as amd. by Laws of 1903, chap. 41. The statute has been since amended by chapter 368 of the Laws of 1905.—[REP.]

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patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation."

Prior to the death of the testatrix, however, the Legislature made it clear by chapter 382 of the Laws of 1900 (adding to Tax Law, § 243) that these exemptions should not be deemed to exempt bequests and devises to such corporations from the tax on taxable transfers. The sole inquiry, therefore, is as to whether the McAuley Water Street Mission is a "religious corporation" or a corporation "organized exclusively for bible or tract purposes" within the provisions of section 221 of the Tax Law.

The certificate of incorporation of the McAuley Water Street Mission provides: "That the particular business and objects of such association are and shall be to do good to the souls and bodies of all who may come under its influence, by proclaiming to them the truths of the Holy Bible, and salvation through the Lord Jesus Christ, by giving them religious instruction, by lifting up the fallen, by aiding the tempted and encouraging them in their efforts to escape from their habits and appetites and by providing a place to which whomsoever will may freely come for Christian worship and fellowship, for the promotion of Godliness and for mutual encouragement in the Christian life."

Evidence was received tending to show that the major part of the business transacted by the mission is of a charitable nature and that the major part of its funds are used for like purposes. We are of opinion that this evidence should not be considered as we agree with the learned counsel for the respondent that the status of this corporation must be determined by the statutory law and its certificate of incorporation rather than by what it has assumed to do thereunder.

It is quite clear, I think, that the mission was not organized exclusively for bible or tract purposes. It was, as its title implies, organized for general mission purposes. The learned counsel for the respondent does not contend that the order can be sustained upon the theory that the mission was organized exclusively for bible or tract purposes. He argues that section 221 of the Tax Law

should be construed as relating to corporations "organized exclusively for religious, bible or tract purposes."

That would be a most liberal construction of the statute and not, I think, in accordance with the intention of the Legislature. It is to be observed that the statute does not provide that bequests or devises to every corporation formed for religious purposes, exclusively or otherwise, shall be exempt, but that devises and bequests "to any religious corporation" shall be exempt. Religious corporations have always been classified by themselves and as separate and distinct from charitable, benevolent and missionary societies. (*Matter of Huntington*, 168 N. Y. 399; *Matter of Watson*, 171 id. 256.) Missionary societies are, in a sense, organized for religious purposes, but they are not under our statutes *religious corporations*, and it was decided by the Court of Appeals in *Matter of Watson* (*supra*) that bequests and devises to missionary and christian associations are not exempt under section 221 of the Tax Law (as amd. by Laws of 1901, chap. 458) from the tax on taxable transfers. Neither the act under which this mission was incorporated nor the Membership Corporations Law, which has superseded and repealed it, authorizes the organization thereunder of a strictly religious corporation or a corporation exclusively for bible or tract purposes as contra-distinguished from missionary purposes.

The learned surrogate based his decision on *Matter of Prall* (78 App. Div. 301) which is clearly distinguishable upon the ground that the Protestant Episcopal Church Missionary Society for Seamen, whose status was there under consideration, was incorporated by a special act of the Legislature (Laws of 1844, chap. 147) for religious purposes and was made subject to many of the provisions and restrictions of "An act to provide for the incorporation of religious societies," passed on the 5th day of April, 1813. (See R. L. 1813, chap. 60.) Its special charter was not repealed by the Membership Corporations Law, nor did it become subject thereto.

It is not for us to say what the statutory law ought to be; that is the province of the Legislature. Our function is to discover and declare the legislative intent. The provisions of the statute under which the exemption is claimed, and in which it must be found if it exists (Tax Law, § 221, as amd. by Laws of 1903, chap. 41), clearly show that the Legislature recognized a distinction between religious cor-



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porations, including corporations organized exclusively for bible or tract purposes and the other corporations organized under the act under which this mission was incorporated and under the Membership Corporations Law and intended to prescribe a different rule therefor, for it is therein provided that personal property, other than *money or securities* bequeathed "to a corporation or association organized exclusively for the moral or mental improvement of men or women or for charitable, benevolent, missionary \* \* \* scientific \* \* \* purposes \* \* \* or for two or more of such purposes, and used exclusively for carrying out one or more of such purposes" shall also be exempted. These bequests to the McAuley Water Street Mission are of money, and they are to a corporation organized for missionary purposes, and are, therefore, not exempt from taxation under the act relating to taxable transfers.

It follows, therefore, that the order of the Surrogate's Court should be reversed, with ten dollars costs and disbursements, and that the order of the surrogate made on the report of the taxable transfer appraiser should be affirmed.

PATTERSON, P. J., and CLARKE, J., concurred.

INGRAHAM, J. (concurring):

The Court of Appeals seems to have held in *Matter of Watson* (171 N. Y. 256) that a religious corporation under section 221 of the Tax Law, as amended by chapter 458 of the Laws of 1901, is a corporation organized under the Religious Corporations Law (Laws of 1895, chap. 723), and does not include a corporation organized under chapter 319 of the Laws of 1848, or the Membership Corporations Law (Laws of 1895, chap. 559), the test, as I understand it, being the particular acts under which the corporation was organized and not the purpose for which it was organized. I imagine that the object for which every religious corporation exists is to "do good to the souls and bodies of all who may come under its influence, by proclaiming to them the truths of the Holy Bible and salvation through the Lord Jesus Christ, by giving them religious instruction, by lifting up the fallen, by aiding the tempted and encouraging them in their efforts to escape from their habits and appetites, and by providing a place to which whomsoever will may freely come for Christian worship and fellowship, for the promo-

tion of Godliness, and for mutual encouragement in the Christian life," the purposes for which this respondent was incorporated, and if the object for which a corporation was incorporated is to control, I should be of the opinion that this was a religious corporation. As this corporation, however, was incorporated under the Benevolent, Charitable, Scientific and Missionary Societies Act of 1848, and not under the Religious Corporations Law, the exemption provided in section 221 of the Tax Law (as am. by Laws of 1903, chap. 41)\* does not apply to legacies of moneys or securities bequeathed to it and I, therefore, concur.

SCOTT, J., concurred.

Order of Surrogate's Court reversed, with ten dollars costs and disbursements, and order of October fifth affirmed.

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In the Matter of the Application of the MAYOR, ALDERMEN and COMMONALTY OF THE CITY OF NEW YORK, Appellant, Respondent, Relative to Acquiring Title, etc., for the Purpose of Opening Perry Avenue from Mosholu Parkway to the Southern Line of Woodlawn Cemetery, etc., in the Twenty-fourth Ward of the City of New York.

FREDERICK H. BRANDT and JOHN J. WILSON, Appellants; THE WOODLAWN CEMETERY, Respondent.

First Department, April 12, 1907.

**Tax — cemetery association in city of New York not liable for assessment on street opening — when abutting owner entitled to damage — charter construed.**

Under the exemption afforded by sections 1 and 2 of chapter 310 of the Laws of 1879, a cemetery association is not only exempt from assessment for street improvements during the period its lands are used for cemetery purposes, but no assessment whatever should be laid against it to be collected in the future when the lands cease to be used for that purpose.

The exemption applies not only to the lands of such association actually occupied as graves, but to all lands held exclusively for cemetery purposes.

When commissioners have erroneously levied an assessment upon cemetery property to be collected when in the future the lands shall have ceased to be

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\* The statute has been since amended by chapter 368 of the Laws of 1905. — [REPR.]

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used for that purpose, the report should be sent back for a redistribution of the sum levied upon other property not exempt.

When an owner of lands conveys portions to grantees with easements of light, air and access over lands proposed to be taken for a public street, reserving to himself the fee of the proposed street, he can convey to the municipality no greater right in the fee of the street than he himself retains. Hence, such original owner by ceding the fee of the street to a municipality does not deprive his prior grantees of the right to compensation for damages to their property caused by a change of grade as authorized by section 980 of the charter of Greater New York.

Section 979 of said charter indicates that a change of grade is a "regulation" of the street under section 980 for which an abutting owner may recover damage. Section 951 of the charter of Greater New York, providing that after the taking effect of the act there shall be no liability to abutting owners for originally establishing a grade, relates exclusively to assessment for local improvements other than those confirmed by a court of record and has no application to a proceeding for street opening.

REARGUMENT of an appeal by the petitioner, The City of New York, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of April, 1903, as amends the report of the commissioners of estimate and assessment in this proceeding by striking out an assessment against the lands of the respondent, the Woodlawn Cemetery.

Also an appeal by Frederick H. Brandt and another from so much of said order as refuses to make an award for certain parcels of land owned by them.

*Joseph A. Flannery*, for the appellants Brandt and Wilson, and for the respondent, the Woodlawn Cemetery.

*Thomas C. Blake*, for the appellant, respondent, City of New York.  
SCOTT, J. :

Two questions are presented by the appeal from the order modifying and, as modified, confirming the report of the commissioners of estimate and assessment in this proceeding.

The first question relates to so much of the report as affects the property of the Woodlawn Cemetery, a rural cemetery incorporated under chapter 133 of the Laws of 1847, and the subsequent acts amendatory thereof. It owns a tract of land in the vicinity of the proposed improvement which, but for the fact that it is cemetery property, would be deemed to be benefited by the improvement and

properly assessable therefor. In distributing the assessment for benefit the commissioners reported assessments aggregating \$668.51 as the proportion of cost equitably chargeable against the cemetery property, but appended to their report a note to the effect that such assessments were not to be collected or enforced so long as the property is used for cemetery purposes. The court below struck out this assessment, and from so much of the order the city of New York appeals. The statute under which the cemetery association claims exemption from assessment is chapter 310 of the Laws of 1879, and reads as follows:

"SECTION 1. No land actually used and occupied for cemetery purposes shall be sold under execution, or for any tax or assessment, nor shall such tax or assessment be levied, collected or imposed, nor shall it be lawful to mortgage such land, or to apply it in payment of debts, so long as it shall continue to be used for such cemetery purposes.

"§ 2. Whenever any such land shall cease to be used for cemetery purposes, any judgment, tax or assessment which, but for the provisions of this act, would have been levied, collected or imposed, shall thereupon forthwith, together with interest thereon, become and be a lien and charge upon such land and collectible out of the same."

It is apparent that this act is open to two possible constructions, one, contended for by the city, would permit the ascertainment and fixation of the ratable share of the assessment which would be imposed upon the property but for its use as a cemetery, postponing the time when such assessment should become a lien and be collectible until the time, if it ever arrived, when the land would cease to be used for cemetery purposes. The other construction, contended for by the cemetery association, would render the property used for cemetery purposes immune even from present ascertainment of its ratable share of an assessment for benefit, so that if the property should ever cease to be used for cemetery purposes it would be burdened with no charges for benefits derived from past public improvements, and liable only to such assessments as might be laid in the future. This second construction is that which has been given to the statute by the Appellate Division in the second department, wherein is comprised a large proportion, territorially,

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of the city of New York. (*Matter of White Plains Presbyterian Church*, 112 App. Div. 130.) In deference to that opinion, and to promote uniformity of practice in proceedings like the present, we adhere to the same construction. We cannot accede to the claim made on behalf of the city that the exemption from assessment, whatever its extent, applies only to so much of the land owned by the cemetery association as has been actually occupied for graves and used for purposes of interment. As was said by the Court of Appeals with reference to a similar exemption contained in chapter 133 of the Laws of 1847: "The purpose of those provisions is the convenience of sale, the security of titles and the benefit and protection of lot owners. We have no reason to suppose, from any language used in the act, that it was the intention of the Legislature that any portion of the cemetery land not laid out into lots, but which must nevertheless be held exclusively for cemetery purposes, should be subject to taxation." (*People ex rel. Oak Hill Cemetery Assn. v. Pratt*, 129 N. Y. 68, 75.)

That the land acquired and owned by the Woodlawn Cemetery is "held and occupied exclusively for a cemetery for the burial of the dead" was determined in this court by *Whittemore v. Woodlawn Cemetery* (71 App. Div. 257). The court below was, therefore, right in striking from the report of the commissioners the amount returned as the sums to be assessed upon the property of the cemetery. It should, however, have gone further and have returned the report to the commissioners for a redistribution of that sum, and its inclusion in the assessments to be laid upon the property benefited by the improvement and not exempted from assessment. In this respect the order appealed from must be modified; otherwise there would be a deficiency in the fund necessary to meet the cost of the improvement.

The second question raised by the appeal is whether or not an award for damages can be made to the owner of a lot abutting upon the street, but who owns no part of the land to be acquired, for incidental damage to a building standing upon the abutting lot, and which is "not required to be taken" for the proposed street opening.

The relevant facts upon which the question is presented are as follows: Prior to October 24, 1890, John G. Wood was the owner

of a tract of land through which runs the avenue proposed to be acquired in this proceeding. On the date named he made a number of conveyances of lots abutting upon the proposed avenue, and so described the lots conveyed as to give to his grantees easements of light, air and access over the land now proposed to be taken for Perry avenue, retaining in himself the fee to the bed of the proposed avenue in front of the lots conveyed. In 1891 the appellants Brandt and Wilson erected buildings upon two of the lots thus conveyed, and in 1895 the grade of the proposed avenue was first officially established by the filing of a grade map on December 16, 1895. The present proceeding was initiated on June 25, 1897, by an application to the court for the appointment of commissioners of estimate and assessment, and commissioners were appointed on December 31, 1897. On September 20, 1897, Wood, the original owner of the tract, and the grantor under whom the appellants hold title, executed a deed of cession to the city of whatever title and interest he still had in the bed of the avenue upon which the lots of the appellants abut. It is said that Perry avenue was actually worked and used as a street, at its natural grade, for some time before proceedings for its acquisition by the city were initiated, but the profile map filed in 1895 shows that it is proposed, after acquisition, to raise its grade about ten feet. The commissioners considered that the damage to the buildings owned by appellants was substantial, but refused to make any award therefor because, as they thought, the cession of the bed of the street by Wood prevented the making of any award for consequential damages to the abutting property. The court below upheld their action in this regard. The only doubt in the case arises from the fact that Wood had conveyed the abutting lots before the proceeding to acquire the street had been begun. In the absence of a statute the owner of land abutting upon a public street is without claim against the municipality for consequential damages resulting to his property either by reason of the establishment of a grade different from the natural grade, or for the change of an established grade. (*Radcliff's Executors v. Mayor, etc., of Brooklyn*, 4 N. Y. 195.) The harsh and often unjust consequences that followed upon the application of this rule has led to the adoption by the Legislature of statutes giving a claim for damages in certain cases. Such pro-

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vision was first made in 1816, by chapter 160 of the laws of that year, and was continued by section 978 of the New York City Consolidation Act of 1882,\* in force when this proceeding was instituted, in the following terms: "If the said commissioners of estimate and assessment shall judge that such intended regulation will injure any building or buildings not required to be taken for the purpose of opening, extending, enlarging, straightening, altering or improving such street, or part of a street, or public place, they shall proceed to make (together with the other estimates and assessments required \* \* \* to be made by them), a just and equitable estimate and assessment of the loss and damage which will accrue, by and in consequence of such intended regulation, to the respective owners, lessees, parties and persons respectively entitled unto or interested in the said building or buildings so to be injured by the said intended regulation; and the sums or estimates of compensation and recompense for such loss and damage shall be included by the said commissioners in their general report of estimate and assessment," etc. This same provision, in substantially the same form, has been embodied in section 980 of the Greater New York charter.† The provisions of section 979 of the Greater New York charter,‡ authorizing the commissioners to obtain a profile and plan of the intended regulation of the street, showing the proposed elevation or depression thereof, indicate that the "regulation" of the street from which it was apprehended that buildings on abutting property might suffer, meant the establishment of a new grade or a change of grade. It is perfectly clear that if Wood had neither conveyed away the abutting lots, nor ceded the bed of the street to the city, but had himself erected the houses, he would have been entitled to the consequential damages resulting to the buildings from the proposed regulation or change of grade of the street. (*Matter of Mayor [Trinity Avenue]*, 81 App. Div. 215.) The fact that Wood, after he had conveyed the abutting lots, made a deed of cession to the city of what remained to him of title to or interest in the bed

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\* Laws of 1882, chap. 410.—[REP.]

† See Laws of 1897, chap. 378, as amd. by Laws of 1901, chap. 406. See, also, Laws of 1905, chap. 299, and Laws of 1906, chap. 658.—[REP.]

‡ See first sentence of note *supra*, and also Laws of 1905, chap. 581, and Laws of 1906, chap. 658.—[REP.]

of the street cannot affect the appellants' rights in this proceeding, for Wood could then convey to the city no more than he then had himself. Prior to the conveyance of the abutting lots he had, as owner of the whole tract, every right to light, air and access that he chose to exercise over any part of the tract for the benefit of any other part. By his deeds of the abutting lots he conveyed not only the fee of those lots, but also the right of light, air and access to those lots over the portion of the tract known as Perry avenue, and now sought to be acquired. . He had thereby conveyed away to his grantees any right which he had to change the grade of that portion of the tract designated as Perry avenue so as to render the right of ingress and egress to and from the abutting lots materially more difficult. (*Cunningham v. Fitzgerald*, 138 N. Y. 165.) He certainly could not convey to the city any greater or better estate in the bed of Perry avenue than he had himself. What he could convey, and all that he could convey, to the city was the fee of the bed of the avenue, less these rights of ownership over it, such as the right to change the grade, of which he had deprived himself by his prior deeds of the abutting lots. These rights could only be acquired or extinguished by the exercise by the city of the right of eminent domain. The appellants' right to compensation is not, therefore, affected in any way by the deeds from Wood to the abutters nor by his cession to the city. By the deeds of the abutting lots Wood simply conveyed to the grantees that right to recover consequential damages for buildings injured but not taken, which he himself would have had if he had retained title to the whole tract, and having conveyed that right before his cession to the city he could not include it in that cession. The appellants are, therefore, entitled to the same damages that Wood would have been entitled to if he had never sold the abutting lots, and the rule applied in *Matter of Mayor (Trinity Avenue)* (*supra*) applies. We have not overlooked section 951 of the Greater New York charter, which provides *inter alia* that after the taking effect of that act there should be no liability to abutting owners for originally establishing a grade. That section is a paraphrase of sections 873 and 874 of the New York City Consolidation Act which were in force when the *Trinity Avenue* case arose. It is to be found in title 2 of chapter 17 of the charter, which relates exclusively to assessments for local



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improvements other than those confirmed by a court of record. It is a rule established only with respect to such improvements and has no relation to or bearing upon proceedings for street openings like the present.

Our conclusion, therefore, is that the order appealed from must be reversed and the report returned to the commissioners with instructions to redistribute the amount found as the benefit to the property of the Woodlawn Cemetery, and to include awards to the appellants Brandt and Wilson for damage to their buildings not required to be taken for the opening of the avenue, with ten dollars costs and disbursements to said appellants.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and report returned to commissioners as directed in opinion. Settle order on notice.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. VAN NORDEN TRUST COMPANY and MARY HELENA SHARPSTEEN, Appellants, v. JAMES L. WELLS and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.

First Department, April 12, 1907.

**Tax — property of non-resident placed in trust subject to taxation.**

A deed of trust executed by a non resident to a resident domestic corporation placing real and personal property in trust to pay the income and profits to the settler and another so long as the latter shall live or until the trust be revoked, creates not a mere agency but a trust of personal property, and the same is subject to taxation.

The fact that the trust deed contains provisions for revocation, not by the settler alone but by her in conjunction with other persons does not affect the validity of the instrument as creating a trust.

APPEAL by the relators, the Van Norden Trust Company and another, from an order of the Supreme Court, made at the New  
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York Special Term and entered in the office of the clerk of the county of New York on the 29th day of September, 1905, dismissing a writ of certiorari theretofore issued herein and confirming an assessment upon personal property.

*Edward W. S. Johnston*, for the appellants.

*William H. King*, for the respondents.

SCOTT, J.:

The relator, Mary Helena Sharpsteen, a non-resident of this State, conveyed and transferred to the Van Norden Trust Company, a domestic resident corporation, a large amount of real and personal estate in trust, to invest and reinvest and to collect the rents, issues and profits, and after paying the expenses of administration, to "pay over one-half of such net rents, issues and profits, income, interest and increment as aforesaid to the said party hereto of the first part (Mary Helena Sharpsteen) and the other half to Mary H. Myer, the mother of the party hereto of the first part as long as the said Mary H. Myer shall live, or until such time as this trust shall be revoked as hereinafter provided for." It was further provided that the trust might be revoked at any time by either of the parties to the trust deed upon giving thirty days' notice in writing to the other party, but this power of revocation could be exercised by the settler, Sharpsteen, only with the concurrent consent of her mother, Mary H. Myer, if living, and her counsel, and if the said Mary H. Myer should be dead, or for any cause incapacitated, then the concurrent consent of Helen A. Michael, the aunt of the settler, and also that of her counsel would be necessary to effect a revocation by the settler.

The question at issue is whether this deed conveyed the legal title in the trust property to the Van Norden Trust Company, or whether such legal title remains in the settler, in which case it would be exempt from taxation in this State.

The relators contend that the instrument merely creates an agency, or at most a passive trust which is not recognized by our statutes, and which confers no title upon the grantee. This view is, as we consider, unsound. We find in the instrument all the essential elements of a trust of personal property. A designated bene-

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ficiary ; a designated trustee who is not a beneficiary ; property sufficiently designated or identified to enable title thereto to pass to the trustee ; and the actual delivery of the property to the trustee in such form as to indicate an intention of passing the legal title to him. (*Brown v. Spohr*, 180 N. Y. 201.) The provisions of the deed of trust clearly indicate an intention to vest the title to the personal property in the trustee. It is authorized to collect not only the interest upon, but also the principal of the mortgages, and to reinvest the principal, and in case of foreclosure to bid in the property, taking title thereto in its own name as trustee. Certainly in so far as the trust is created for the benefit of the settler's mother, it complies in every regard with the requirements of law respecting the creation of a valid and effectual trust, and being a valid trust to that extent at least it cannot be properly called a passive trust or a mere agency. The fact that the trust deed contains provisions for revocation, not by the settler alone, but by her in conjunction with other persons, does not affect the validity of the instrument as one creating a trust. (*Schreyer v. Schreyer*, 101 App. Div. 456 ; *affd.*, 182 N. Y. 555.) We are, therefore, of the opinion that the instrument in question created a valid, active trust, and that the legal title to the trust estate passed to and vested in the trustee. It follows that the order appealed from must be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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JOHN DELAHUNTY, Respondent, v. RICHARD A. CANFIELD,  
Appellant.

First Department, April 19, 1907.

**Contract — attorney and client — agreement to collect gambling debts for contingent fee.**

An agreement by an attorney to collect for a contingent fee all claims which may be defended upon the ground that they were gambling debts is contrary to public policy and void. The court will not aid in its enforcement.

(Per LAUGHLIN, J., and PATTERSON, P. J): A verdict for an attorney founded upon said contract made ten years before the services were rendered is not warranted by the evidence when the attorney fails to deny testimony that a settlement for claims collected was made upon a different basis.

APPEAL by the defendant, Richard A. Canfield, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of June, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 13th day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

*H. Snowden Marshall* [*George Gordon Battle* with him on the brief], for the appellant.

*Edmund L. Mooney* [*S. Hanford* with him on the brief], for the respondent.

LAUGHLIN, J. :

The complaint sets forth two causes of action for legal services which were embraced in separate actions and consolidated into one. The first cause of action is for services rendered in collecting the sum of \$130,000, on three notes, each for \$100,000. Plaintiff sought to bring this collection within the terms of a special agreement, made between him and the defendant some ten years prior to the rendition of the services, by which he was to receive twenty-five per cent on the collection of any notes, obligations or claims that might be turned over to him by the defendant for collection, to which the defense of gambling should or might be interposed. These notes were not placed in the hands of the plaintiff by the defendant for collection in the usual manner in which a client places claims in the hands of his attorney. The negotiations which resulted in the collection of \$130,000 on the notes were instituted, not by the defendant, but by an offer on the part of the maker of the notes through an attorney to the plaintiff, to compromise the defendant's claims thereon, and this before the notes had become due or payable. The notes were given principally for borrowed money, and the ground upon which a deduction from the face of the notes appears to have been claimed was the infancy of the maker. It does not appear what part of the indebtedness, if any,

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was incurred, or claimed to have been incurred, in gambling. The defendant authorized the plaintiff to negotiate a settlement for \$100,000 if no more could be obtained. The plaintiff obtained for his client \$30,000 more than the latter was willing to accept, and, therefore, his services were very valuable in the result obtained. It is not at all clear, however, that these notes, in any view of the case, fall within the terms of the special contract for twenty-five per cent of the amount collected. Some claims had been placed in the hands of the plaintiff under the special agreement many years before, but no collection had been made thereunder. At the time the negotiations which resulted in the settlement of these notes were instituted the defendant was in Europe, having discontinued the pursuit of gambling, which he had followed in the city of New York for many years, and had placed all of his affairs, so far as the services of an attorney were required, in the hands of the plaintiff under general authority to take such steps as he might deem advisable for the protection of the rights and interests of the defendant. In the circumstances there is much force in the contention made in behalf of the appellant that the special agreement with respect to collections terminated with this general employment. The plaintiff testified that he paid over the \$130,000 collected by him to the defendant's manager, and at the same time requested and received \$5,000 on account for the services rendered. The defendant's manager testified that the plaintiff at the time stated in substance that his charges for collecting the notes would be \$10,000, \$5,000 of which he directed should be credited upon obligations held by the defendant against him for borrowed money, and \$5,000 of which he desired and received in cash, and that this charge for the services was communicated to and approved by the defendant. The defendant admits that he acquiesced in the charge of \$10,000, and his manager testified that at a subsequent interview between them and plaintiff, upon the rendition of plaintiff's bill, this charge of \$10,000 was expressly agreed upon by the parties. Plaintiff, when first called as a witness, testified in substance that at the time he received the \$5,000 in cash from the defendant's manager, nothing more was said with respect to his charges for the collection than has already been stated in this opinion in giving his version of that interview. After the manager of the defendant testified that plaintiff stated

that he would charge \$10,000 for collecting the notes, and testified concerning the allusion to and acquiescence in this charge at a subsequent interview between plaintiff and defendant, plaintiff was called to the stand in rebuttal, but made no denial of the conversation between him and the defendant and the latter's manager, concerning which he had not been interrogated when first on the stand; and he made no specific or further denial of the testimony of defendant's manager with respect to his having made a charge of \$10,000 for his services in collecting the notes. The court submitted to the jury the question as to whether the plaintiff at that time agreed to accept \$10,000 for the services in collecting the notes, and the verdict shows that the jury found that he did not, for they found for the plaintiff for the full amount demanded in each cause of action.

In the circumstances we think that in the absence of a denial by the plaintiff of the testimony of defendant's manager with respect to plaintiff's having made a charge of \$10,000 for these services, which was acquiesced in by defendant, the verdict should not be permitted to stand in the amount rendered. In the judgment which has been entered upon the verdict, the plaintiff has been allowed \$32,500, which is twenty-five per cent of the \$130,000 collected. We are of opinion that the verdict in this regard is not fairly sustained by the evidence, and unless the plaintiff is willing to reduce the *recovery* by the sum of \$22,500, together with interest thereon from the 17th day of December, 1904, the date of the rendition of his bill, being the date from which interest was figured, which will be in accordance with the proof as we gather it from the record as to the first cause of action, there should be a new trial.

The evidence is sufficient to support the recovery on the second cause of action, and we think no other error sufficiently serious to require a new trial was committed.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event, unless within ten days from the service of the order to be entered hereon the plaintiff shall file a stipulation consenting that the judgment be modified by reducing the recovery by the sum of \$22,500, together with interest thereon from the 17th day of December, 1904; and if such stipulation shall be filed, the judgment will be modified

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accordingly, and as so modified it and the order will be affirmed, without costs of the appeal to either party.

PATTERSON, P. J., concurred.

SCOTT, J. (concurring):

So far as concerns the plaintiff's first cause of action for collecting \$130,000 on notes for \$300,000 the plaintiff sues on an alleged special agreement, made ten years before, whereby defendant promised to pay to plaintiff twenty-five per cent of all claims he might collect which were defended or objected to on the ground that they were gambling debts. If such a contract was, in fact, made it was, in our opinion, contrary to public policy and void, and the court should give no aid to its enforcement. The defendant was a common gambler pursuing his vocation in a house maintained by him for the purpose in the city of New York, and also at other places. The statutes of this State have placed gambling, such as the defendant pursued, in the category of crimes, and have expressly declared that all evidences of indebtedness, of which the consideration, in whole or in part, is money lost at play, shall be utterly void. If gambling is criminal, illegal and immoral, and the money lost thereat is for that reason made uncollectible, it seems to me to be perfectly clear that an agreement to compensate a lawyer for collecting such a claim by paying him a percentage of the amount recovered must be treated as itself illegal and unenforceable. Such an agreement amounts to nothing more than the employment of an attorney to collect the fruits of a crime for compensation consisting of a percentage of such fruits. In the present case not only was the claim tainted with illegality, but the person against whom it was made is shown to have been a boy under age. If, therefore, the plaintiff's claim upon his first cause of action is to rest upon such a contract between himself and defendant he should have been nonsuited. If, on the other hand, the claim which he collected was, as the defendant says, mainly or partly for borrowed money, as to which the defense that it was for a gambling debt would be unavailing, the case did not fall within the terms of the alleged special agreement, and \$10,000 is certainly a very liberal allowance. The amount allowed by the jury and now about to be confirmed for the services, mainly futile and often injudicious,

included in the second cause of action, appears to be, to say the least, very generous, but as to that question we are not disposed to set up our own judgment against that of the jury. We, therefore, concur in the disposition of the appeal indicated in the opinion of Mr. Justice LAUGHLIN.

INGRAHAM and CLARKE, JJ., concurred.

Judgment reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as stated in opinion, in which event judgment as so modified and order affirmed, without costs. Settle order on notice.

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In the Matter of the Proceedings for the Probate of the Last Will and Testament of MARY E. SHATTUCK, Deceased.

WILLIAM A. COOK, by ROBERT DORNBURGH, His Special Guardian, Appellant; HORACE A. MOSES, as Executor, etc., of MARY E. SHATTUCK, Deceased, Respondent.

Third Department, March 18, 1907.\*

**Will — trust for charitable uses — corporations — power to take — when trust not void for indefiniteness — power of Supreme Court to supervise gift to charitable uses.**

Section 6 of chapter 319 of the Laws of 1848 (as amd. by Laws of 1903, chap. 623), providing that certain corporations shall not take more than one-half of an estate under a will made within two months of the death of a testator, affects only corporations formed under that act and has no application to other corporations.

When a testator devises his residuary estate in trust, the rents and profits to be expended by the executor annually and paid over to religious, educational and eleemosynary institutions as in his judgment shall seem advisable, not more than \$500 to be paid to any one institution in any one year, although the will is indefinite as to any particular beneficiary or any particular charitable purpose, the indefiniteness does not invalidate the gift when the purpose can be ascertained to be of a charitable nature.

Such will should not be held to be invalid upon the ground that the trustee may in his discretion pay to corporations formed under the act of 1848 and not enti-

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\*Proof not received in time for insertion in proper place.



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tled to take, because by section 2 of chapter 701 of the Laws of 1893 (as amd. by Laws of 1901, chap. 291), the Supreme Court has control over gifts, bequests and devises of that nature, and may be appealed to at any time in order that the gift may take the course indicated, and not go to societies incompetent to take or for purposes not contemplated by the testator.

APPEAL by William A. Cook, by Robert Dornburgh, his special guardian, from a decree of the Surrogate's Court of the county of Essex, entered in said Surrogate's Court on the 30th day of August, 1906, admitting to probate the will of Mary E. Shattuck, deceased, and overruling the objections thereto.

*Robert Dornburgh*, for the appellant.

*H. D. Hoffnagle* [*Edgar T. Brackett* of counsel], for the respondent.

KELLOGG, J.:

By the 8th clause of the will the testatrix gave all of the residue of her real and personal estate to her executor, in trust, however, "the rents, profits and income thereof to be expended by him annually and to be paid over to religious, educational or eleemosynary institutions, as in his judgment shall seem advisable, not more than \$500, however, to be paid to any one such institution in any one year."

Section 6 of chapter 319 of the Laws of 1848 (as amd. by Laws of 1903, chap. 623), providing that certain corporations shall not take more than one-half of an estate under a will made within two months of the death of a testator, applies only to corporations formed under that act; other corporations are unhampered by the provisions of section 6, the only surviving section of the original statute. (*Matter of Lampson*, 161 N. Y. 511-520.)

It is urged by the appellant that the trustee has power under the will to so distribute the estate that corporations formed under the original act of 1848 may receive the benefits of it in violation of that act, and that while the will provides for the payment of the income to religious, educational and eleemosynary institutions, that the educational institutions may be public or private, may be conducted as a charity or for gain, and that the trustee may so administer the trust that educational institutions conducted for the pur-

pose of gain may receive all or a part of the income from the estate.

These contentions overlook the fact that the will itself, by giving the income to such corporations, shows an intent that it shall be used for the charitable purposes which those institutions represent, and that section 2 of chapter 701 of the Laws of 1893 (as amd. by Laws of 1901, chap. 291), which act is entitled "An act to regulate gifts for charitable purposes," provides that the Supreme Court "shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act," and the act relates to gifts for the uses indicated by this will. The Supreme Court, therefore, may be appealed to at any time to require that this gift take the course indicated, and that it shall not go to societies incompetent under the law of taking it, or be used by any society for a purpose not contemplated by the statute or the testator.

The will is indefinite as to any particular institution or any particular charitable purpose, but the mere indefiniteness of the provision when the purpose of it is ascertained to be of a charitable nature does not invalidate it. (*Allen v. Stevens*, 161 N. Y. 122.)

It is apparent that the testatrix intended her property for the charitable uses indicated by the class of institutions to which she has directed the moneys to be paid, and the Supreme Court, from time to time, will see that the fund is properly administered and that it goes into the channels contemplated by the testatrix and the statute.

The decree of the surrogate should be affirmed. No costs are awarded against the special guardian, appellant.

Decree unanimously affirmed, with costs.

# CASES REPORTED WITH BRIEF SYLLABI

AND

## DECISIONS HANDED DOWN WITHOUT OPINION.

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SECOND DEPARTMENT, MARCH, 1907.

DANIEL DEEGAN, Appellant, Respondent, v. THE GUTTA-PERCHA AND RUBBER  
MANUFACTURING COMPANY, Respondent, Appellant.

Cross-appeals from an order of the Supreme Court, entered in the office of the clerk of Kings county on the 3d day of January, 1906.

JENKS, J.: We think that the order setting aside the verdict should be affirmed. We do not, however, wish to be understood as putting our affirmance upon the proposition that the plaintiff's theory is necessarily so counter to a physical and scientific fact as to be incredible as matter of law within the principle announced in *Fealey v. Bull* (163 N. Y. 397, 402); *Matter of Harriot* (145 id. 540). We express this limitation in view of an expression of the learned trial judge in his opinion, although it is clear enough that he intended to rest his action upon the question of the weight of evidence, inasmuch as he granted a new trial. The learned trial court could have directed a verdict for the defendant in view of its reservation of the motion of the defendant, and if it had done so this disposition must have been upheld. But we are not inclined to disturb the disposition made and, therefore, we dismiss appeal from the order denying a direction of a verdict for the defendant, without costs. Woodward, Gaynor and Rich, JJ., concurred; Hooker, J., voted to reinstate the verdict. Order granting new trial affirmed, with costs. Appeal from order denying motion for direction of a verdict dismissed, without costs.

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GEORGE R. COMRIE, Appellant, v. THE METROPOLIS SECURITIES COMPANY,  
Respondent.

*Principal and agent — right of real estate broker to commissions where parties have agreed upon terms of sale, but fail to execute contract.*

Appeal by the plaintiff from a judgment of the Supreme Court, entered in the office of the clerk of Kings county on the 19th day of March, 1906, and also from an order entered in the said office on the 31st day of May, 1906.

Judgment and order affirmed, with costs. No opinion. Jenks, Gaynor, Rich and Miller, JJ., concurred; Hooker, J., read for reversal.

HOOKE, J. (dissenting): This is an appeal by the plaintiff from a judgment entered upon a nonsuit. The plaintiff's assignors were real estate brokers employed by the defendant to sell a certain piece of real estate, and they procured a purchaser who, it is conceded, was able to purchase; the question turns

upon the proposition whether he was ready and willing to purchase upon the defendant's terms. The intending purchaser, his attorney and one of the plaintiff's assignors met the defendant's agent, whose ostensible authority is apparent. At the latter's office in the morning the parties agreed upon the price to be paid, and then the defendant's agent dictated to his stenographer a proposed contract by the terms of which the defendant was to sell and the purchaser to buy the real estate in question; after the defendant's agent had completed the dictation he asked the purchaser's attorney whether what had been dictated was satisfactory; the latter suggested that there should be two other clauses inserted in the contract, first, one providing that the personal property and the fixtures then on the premises should go with the real estate; and the other, that the defendant "deliver the premises free and clear of all orders or violations of the Tenement House Department up to the day of closing contract." After starting to dictate two clauses of this tenor, the defendant's agent suggested to the purchaser's attorney that he do so, and the latter dictated them himself to the stenographer. The defendant's agent then suggested that inasmuch as it would take some time to transcribe the contract, the parties had better return later to complete the signing of the contract. This they did, only to find, however, that the defendant's agent during the meantime had discovered that there was in force an order of the tenement house department criticising the building upon the premises in question, because of the failure of the water in the pipes to reach the top floor, and that a *lis pendens* had been filed on that account and the matter placed in the hands of the corporation counsel. The defendant's agent refused either to make an allowance in the purchase price on this account or to remedy the trouble himself, although his attention was called to his agreement of a few hours previous as dictated to the stenographer that the defendant should deliver the premises "free and clear of all orders or violations of the Tenement House Department up to the day of closing contract." The sale was not consummated. The jury would have been justified in finding upon the evidence of the plaintiff's witnesses that the contract as dictated to the stenographer was a statement by the defendant of the terms and conditions upon which it would sell its property. These terms and conditions, as so stated, were satisfactory to and accepted by the purchaser and the plaintiff's assignors having produced a purchaser who was able to buy and, as shown, willing to take upon the defendant's terms, they had earned their commissions and the defendant was liable. The objection that the defendant's agent raised after the return of the parties to his office had no greater effect upon the broker's rights than as though the former had changed his mind about the price at which he wished to sell the property during the interim and refused on the return of the parties to enter into a contract unless the purchaser would pay him more money than he had asked and than they had agreed upon earlier. In other words, the defendant declared its terms in detail; the purchaser accepted them; and with this, the broker's commissions were earned, irrespective of the owner's recanting as to one of the material terms. The judgment and order should, therefore, be reversed and a new trial granted, costs to abide the event.

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DANIEL D. FITZGERALD, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

*Negligence — right of way — pedestrian struck by street car between intersecting streets.*

Appeal by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the County Court of Queens county in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 16th day of April, 1906, upon the verdict of a jury for seventy-five dollars, and also from an order entered in said clerk's office on the 15th day of May, 1906, denying the defendant's motion for a new trial made upon the minutes.

MILLER, J.: The defendant appeals from a judgment of County Court, entered on the verdict of a jury, and from an order denying a motion for a new trial. The action is for negligence. The plaintiff claims that he was going diagonally across Manhattan avenue in the borough of Brooklyn between street intersections; that as he left the curb he looked in the direction of Greenpoint ferry, from whence the car colliding with him came, and saw no car; that he looked again before stepping on the track and saw no car, although there was nothing to obstruct his view; that as he stepped upon the track he was compelled to wait to allow a car on the further track to pass, and that while waiting he was struck and received the injuries for which the action is brought. The street was narrow, the distance from the curb to the first rail being eight feet. At the point where the accident occurred the defendant's car had the right of way. This feature of the case is important both in determining the plaintiff's duty and the care required of the defendant's motorman. The care required of the pedestrian and the motorman respectively under such circumstances is discussed, and the authorities bearing upon the proposition collated by LAUGHLIN, J., in *Barney v. Metropolitan Street R. Co.* (94 App. Div. 888, 895). Without restating the conclusions reached in that case it is sufficient to say that we fully agree with them, and that they required a dismissal of the complaint upon the proof in this case. The judgment and order should be reversed and a new trial granted, costs to abide the event. Jenks, Hooker, Gaynor and Rich, JJ., concurred. Judgment and order of the County Court of Queens county reversed and new trial ordered, costs to abide the event.

Henry Bloomgarden, Appellant, v. Ernst Hoffman and Alma Hoffmann, Respondents.—Motion denied, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Mary F. Cushman, as Executrix of the Last Will and Testament of Thomas H. Cushman, Deceased, Appellant, v. Harry C. Cushman, Individually and as Executor, etc., and Others, Respondents.—Motion denied, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

John H. Delesderniers, Respondent, v. The Philadelphia Casualty Company, Appellant.—Motion denied, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

David Freitag, Respondent, v. Jacob Rechnitz and Others, Appellants.—Motion denied on condition that the defendant pay ten dollars costs and forthwith perfect the appeal and file the return in this court. Otherwise motion granted, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Clarence E. Hopkins, Respondent, v. Calleson Horse Company, Appellant.—Motion denied, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

In the Matter of the Application of Andrew Dittrich, Executor, etc., under the Last Will and Testament of Mary Dittrich, Deceased, for the Removal of Ellen C. Duffy, as Executrix and as Testamentary Trustee under the Said Last Will and Testament.—Motion to amend record denied. Present—Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ.

In the Matter of the Application of Charles H. Gardner, Individually and as General Guardian of Gustav Gardner, an Infant, etc.—Motion granted. Fee of the guardian *ad litem* to be paid out of the father's fund. Present—Woodward, Jenks, Gaynor and Rich, JJ.

William G. Jones, Appellant, v. Frederick Waldemar Fuchs and Others, Respondents.—Motion to dismiss appeal granted, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

John Kascsak, Respondent, v. Central Railroad Company of New Jersey, Appellant.—Motion denied, with ten dollars costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

John G. Liebler, Respondent, v. Dennis Winter, Appellant.—Motion granted, with ten dollars costs, unless the appellant perfect his appeal and file his return within twenty days, in which event the motion is denied, without costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Elias Mandel, Respondent, v. Morris Manson and George Jacobson, Doing Business under the Firm Name of Manson & Jacobson, Appellants.—Motion to dismiss appeal denied, with ten dollars costs. Motion to compel the filing of the return dismissed as to the municipal justice; in other respects motion granted, without costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Louis W. Olms, Appellant, v. Theodore A. Bingham, Individually, etc., and Others, Respondents.—Motion for reargument denied, without costs, and order modified by striking out the provision for costs and disbursements. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Hillary H. Quarmby, by Sarah Ann Quarmby, His Guardian ad Litem, Respondent, v. James Weir's Sons, Appellant.—Motion granted, with ten dollars costs, unless the appeal is perfected and return filed within twenty days, in which event the motion is denied, without costs. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Tilly Schnurr, Appellant, v. Alexander Quinn, Respondent.—Motion for reargument denied. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Emma A. Serviss, Respondent, v. Brooklyn, Queens County and Suburban Railroad Company, Appellant.—Motion denied on condition that defendant pay ten dollars costs and perfect the appeal within one week after the return of Mr.

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Rawle to this country; but in default of which the motion is granted, with costs. Present — Woodward, Jenks, Gaynor and Rich, JJ.

William T. Shedd, Individually and as Trustee, etc., and Others, Plaintiffs, v. the Town of Cortlandt and Orsamus B. Lent, Defendants.—Motion granted. Present — Woodward, Jenks, Gaynor and Rich, JJ.

Abraham Teller, Appellant, v. Herman Schulz and Frances Schulz, Respondents.—Motion granted, without costs. Present — Woodward, Jenks, Gaynor and Rich, JJ.

Thompson-Bonney Company, Respondent, v. I. S. Van Loan Company, Appellant.—Motion denied on condition that the defendant pay ten dollars costs and forthwith perfect the appeal and file the return in this court. Otherwise motion granted, with ten dollars costs. Present — Woodward, Jenks, Gaynor and Rich, JJ.

Minnie Adlin, as Administratrix, etc., of Elimelich Adlin, Deceased, Respondent, v. The Excelsior Brick Company of Haverstraw and Others, Impleaded with John W. Gillies and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Helene Ahrensbeumer, Respondent, v. The Board of Education of the City of New York, Appellant.—Judgment affirmed, with costs. No opinion. Hirschberg, P. J., Jenks, Hooker and Rich, JJ., concurred.

American Dock and Trust Company, Respondent, v. Tweedie Trading Company, Appellant.—Judgment unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ.

Nicholas Basso, Respondent, v. D. Allen's Sons Rope Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Gaynor, Rich and Miller, JJ., concurred.

George S. Billings, as Receiver, etc., of the Hudson River Stone Supply Company, Respondent, v. James G. Shaw and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Gaynor, Rich and Miller, JJ., concurred.

Francis Boulland, an Infant, by Rose Muller, His Guardian ad Litem, Respondent, v. Jacob Ruppert, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Woodward, Jenks, Gaynor and Rich, JJ.

Robert H. Bowly, Appellant, v. Nellie L. Beirne and Agnes Beirne, as Administratrices, etc., of Edward C. Beirne, Deceased, Respondents, Impleaded with Georgi Sayer, as Administratrix, etc., of James E. Sayer, Deceased.—Judgment and order of the County Court of Orange county affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

The City of New York, Respondent, v. Justus I. Wakelee and Annie B. Sedgwick, Doing Business under the Firm Name of "Sedgwick Machine Works," Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Bernadette M. Coleman, as Administratrix, etc., of Thomas M. Coleman, Deceased, Appellant, v. Benjamin J. Hall and Others, Respondents.—Judgment unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ.

Wallace E. J. Collins, as Trustee, etc., of Frederick D. Hodges, Bankrupt, Respondent, v. Frederick D. Hodges and Emily Matilda Hodges, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Arthur J. Corbett, Appellant, v. August Marriolle and Patrick Mullin, Respondents.—We think the clear preponderance of proof supports the claim that the defendants were copartners. Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event. Jenks, Hooker, Gaynor and Miller, JJ., concurred.

Richard J. Donovan, Respondent, v. George L. Shearer, Appellant, Impleaded with Others.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Douglaston Hose Company, No. 1, Appellant, v. The City of New York, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, Hooker, Rich and Miller, JJ., concurred.

Paula Edenbaum, as Administratrix, etc., of David Edenbaum, Deceased, Respondent, v. The Excelsior Brick Company of Haverstraw and Others, Defendants, Impleaded with John W. Gillies and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Gaynor, Rich and Miller, JJ., concurred.

Henry L. Franklin, Appellant, v. The New York Herald Company, Defendant, Isaiah Goldsmith, Assignee of Henry L. Franklin, Appellant; Ellen Morris, as Administratrix, etc., of Henry J. Morris, Deceased, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Edith Jacobs, Respondent, v. The Board of Education of the City of New York, Appellant.—Judgment affirmed, with costs. No opinion. Hirschberg, P. J., Jenks, Hooker and Rich, JJ., concurred.

Martin I. Johnson, Respondent, v. Katie M. Conselyea, Appellant, Impleaded with Sarah J. White and Others.—Order of the county judge of Queens county affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Jones Hook and Ladder Company, No. 1, Respondent, v. The City of New York, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor and Miller, JJ., concurred.

Mary Kane, Appellant, v. Margaret J. Lyons, Respondent.—Judgment affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

John F. McCarthy and Others, Respondents, v. Edgar H. Hazelwood, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Hooker and Miller, JJ., concurred.

Dennis McDonnell, an Infant, etc., Respondent, v. Arthur Greenfield, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. Woodward, Jenks, Hooker, Gaynor and Rich, JJ., concurred.



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**Ella Muller, Respondent, v. Louis Muller, Appellant.**—Appeal dismissed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

**Samuel Postlein, Respondent, v. David M. Michel, Appellant.**—Judgment of the Municipal Court unanimously affirmed, with costs. No opinion. Present—Jenks, Hooker, Gaynor and Miller, JJ.

**The People of the State of New York, Respondent, v. Philip Form, Appellant.**—Judgment of conviction affirmed. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

**The People of the State of New York ex rel. Michael H. Feeney, Appellant, v. John V. Coggey, as Commissioner of Corrections of the City of New York, Respondent.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

**Annie L. Quinlan, Respondent, v. The City of New York, Appellant.**—Judgment unanimously affirmed, with costs, on the authority of *Gravey v. City of New York* (117 App. Div. 773). Present—Jenks, Hooker, Gaynor and Miller, JJ.

**Mary J. Ralph, Respondent, v. The Board of Education of the City of New York, Appellant.**—Judgment affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Rich and Miller, JJ., concurred.

**Samuel Reyman, Respondent, v. Hall B. Waring, Appellant.**—Judgment and order of the County Court of Westchester county unanimously affirmed, with costs. No opinion. Present—Jenks, Hooker, Gaynor and Miller, JJ.

**Mary S. Roper, Appellant, v. Ulster County Agricultural Society, Respondent.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

**Theodore P. Shonts, Respondent, v. Edward R. Thomas and Others, Appellants.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Gaynor, Rich and Miller, JJ., concurred.

**Christopher Staiger, Respondent, v. Robert H. Klitz and Charles R. Jung, Appellants.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

**James A. Stevenson, Appellant, v. John A. Kelly and Frederick J. Kelly, Respondents.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

**Ingham Stublely, Respondent, v. Abel H. Gilbert, Appellant, Impleaded with Thomas L. James and Others.**—Interlocutory judgment affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

**The Title Insurance Company of New York, Respondent, v. Herman Lobel, Appellant.**—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor, Rich and Miller, JJ., concurred.

**John Ubart, as Administrator, etc., of Lizzie Ubart, Deceased, Respondent, v. The Baltimore and Ohio Railroad Company, Appellant.**—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Hooker, Gaynor and Rich, JJ., concurred.

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Benjamin Vehrlen, Respondent, v. Antonio Musica, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, Hooker, Gaynor and Miller, JJ.

Frederick Voeller and Henry L. Van Syckel, Appellants, v. Henry Bieg, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Gaynor, Rich and Miller, JJ., concurred; Hooker, J., dissented.

Charles L. Wallace, Respondent, v. Samuel M. Meeker, Respondent. Herman J. Martens, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Jacob Weiss, Respondent, v. Hyman Meyersohn, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Gaynor, Rich and Miller, JJ., concurred.

Saul Alexandre and Joseph Meyer, Copartners, etc., Appellants, v. Richard McNerney, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Mira Beals, Respondent, v. Myles J. Evans, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, unless the plaintiff stipulate within twenty days to reduce the recovery to the sum of \$1,500 and the extra allowance proportionately, in which event the judgment and order as modified are affirmed, without costs. No opinion. Hooker, Gaynor and Rich, JJ., concurred; Hirschberg, P. J., voted for affirmance.

George B. Boyd, as Receiver, etc., Appellant, v. Conrad Eurich's Brewery, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Esther De Puy Bryan, Appellant, v. Fannie Louise Burroughs (formerly Temple), Individually and as Executrix of and Trustee under the Last Will and Testament of Joseph Hamilton Bryan, Deceased, Respondent, Impleaded with Others.—Judgment affirmed, with costs. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

James A. Dumont, Jr., Respondent, v. Morris & Cumings Dredging Company, Appellant.—Judgment and order affirmed, with costs. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Paul A. English and Others, Appellants and Respondents, v. Percival S. Jones and Henry J. McCormick, Respondents, and Charles B. Brown, Respondent and Appellant.—Judgments affirmed, without costs. There is no authority for the practice adopted of rendering separate judgments and presenting separate and distinct records in a single action. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Robert P. Fay, Respondent, v. V. J. Hedden & Sons Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Jenks, Hooker, Rich and Miller, JJ.

James Fazio, Appellant, v. Loop Roller Coaster Company, Respondent.—Judgment affirmed, with costs. No opinion. Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ., concurred.

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William H. French and Sarah E. French, Appellants, v. Barrett Bridge Company, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Woodward, Rich and Miller, JJ.

John J. Growvogel, Respondent, v. Siegel-Cooper Company, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Woodward, Jenks, Hooker, Rich and Miller, JJ.

Samuel Hoffman, Respondent, v. Nathan Lubetkin, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ.

Bernard Kandel, Respondent, v. The Cudahy Packing Company and Matthew T. Mulvihill, Individually and as City Marshal, etc., Appellants.— Judgment of the Municipal Court affirmed, with costs. No opinion. Hirschberg, P. J., Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Mary E. Kolb, Appellant, v. John Gibb and Others, Composing the Firm of Frederick Loeser & Company, and The New York Building-Loan Banking Company, Respondents.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Woodward, Jenks, Gaynor and Rich, JJ.

Florence Leonardi, Respondent, v. Mary Dekoning and Frank Dekoning, Appellants.— Judgment of the Municipal Court affirmed, with costs. No opinion. Jenks, Hooker, Gaynor and Miller, JJ., concurred.

Theodore O. Loveland and James L. Records, Trading as the Equitable Manufacturing Company, Appellants, v. Philip M. Bernstein and Joseph A. Bernstein, Trading as Bernstein Brothers, Respondents.— Judgment of the County Court of Nassau county affirmed, with costs, on the ground that there is no evidence in the record that the plaintiffs did business under the name of the Equitable Manufacturing Company, and that the contract sued on was executed by them or in their behalf under that name. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

James Matthews and Gardiner D. Matthews, Appellants, v. Albert V. Sammis and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

John McCallum, Respondent, v. John Guinan, Appellant.— Interlocutory judgment affirmed by default, with costs. Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ., concurred.

Mamie Mundt, Respondent, v. Ella M. Whiffen, Appellant.— Order of the City Court of Mount Vernon setting aside dismissal of the complaint and granting new trial affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Gaynor, Rich and Miller, JJ., concurred.

Ellen C. Osborn, Respondent, v. Howard J. M. Cardeza and Others, Defendants, Impleaded with William E. S. Griswold, as Trustee in Bankruptcy of John Osborn's Sons & Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Benedicto Pascuai, Respondent, v. Jose Rodriguez and Manuel Suarez, Appellants.— Appeal from judgment of the Municipal Court dismissed on argument, with costs. Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ., concurred.

The People of the State of New York, Respondent, v. Albert Roselli, Appellant.— We think this judgment is decidedly against the weight of evidence. Judgment of conviction reversed. Jenks, Hooker, Rich and Miller, JJ., concurred.

The People of the State of New York ex rel. William J. Eggers, Respondent, v. Theodore A. Bingham, as Police Commissioner of the City of New York, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Jenks, Gaynor, Rich and Miller, JJ., concurred.

John Ruemer, Respondent, v. Margaret A. Clark, Appellant.— Judgment and order affirmed by default, with costs. Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ., concurred.

Townsend Scudder, Appellant, v. Nassau County Press, Respondent.— Action discontinued by written stipulation, and order signed and entered.

Michael Sweeney, Respondent, v. S. Liebmann's Sons Brewing Company, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ.

Joseph Weinberg, Appellant, v. Max Feldman, Respondent.— Judgment of the Municipal Court unanimously affirmed, with costs. No opinion. Present — Woodward, Jenks, Gaynor and Rich, JJ.

H. Stanley Wills, Appellant, v. Nathan Weiss, Respondent.— Judgment of the Municipal Court affirmed by default, with costs. Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ., concurred.

Frederick Henry Bruckel, Respondent, v. J. Mil'bau's Son, Appellant.— Motion denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Joseph A. Burr and Others, Composing the Firm of Burr, Coombs & Wilson, Respondents, v. David K. Case, Appellant.— Motion to dismiss appeal granted, with costs, unless the appeal is perfected in time to place the case on the April calendar. On compliance, motion denied, without costs. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Annie Feldman and Another, Respondents, v. Harry Gurland and Others, Appellants.— Motion to resettle order denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Louisa Frank, Respondent, v. Mary Miller and Jacob Miller, Appellants.— Motion denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners for the City of New York, for the Appointment of Three Commissioners, etc. Brooklyn, Manhattan and Long Island City Route.— Motion granted and order signed. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

James J. O'Boyle, Respondent, v. Erie Railroad Company, Appellant.— Motion denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Henry H. Petze, Appellant, v. Daniel J. Leary, Respondent.— Motion denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

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The People of the State of New York ex rel. Charles Hoeffle, Appellant, v. Matthew J. Cahill, Coroner of the Borough of Richmond in the City of New York, Respondent.—Motion to resettle order granted, without costs. Present—Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

The People of the State of New York ex rel. Thomas R. McGinley, Appellant, v. Matthew J. Cahill, as Coroner of the Borough of Richmond in the City of New York, Respondent.—Motion to resettle order granted, without costs. Present—Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

John Ubart, as Administrator, etc., of Lizzie Ubart, Deceased, Respondent, v. The Baltimore and Ohio Railroad Company, Appellant.—Motion denied, with costs. Present—Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ.

Thomas Burke, Respondent, v. Levering & Garrigues Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Edward Christie, Respondent, v. New York and Queens County Railway Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Charles D. Cords, Respondent, v. Edward Ruth, Appellant.—Judgment of the Municipal Court reversed on reargument on the opinion in the same case (115 App. Div. 568), and new trial ordered, costs to abide the event. Woodward, Jenks, Hooker, Gaynor and Rich, JJ., concurred.

Frank Dojahn, Respondent, v. Herman Schomaker, Appellant.—The determination of this appeal will be postponed for the present, and if the respondent can supply the missing testimony, supported by affidavit, it will be received as a part of the return. Such evidence must be supplied in court on March 22, 1907.

Daniel Le Roy Dresser, Respondent, v. The Mercantile Trust Company and Others, Appellants, Impleaded with Others.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Samuel Edwards, Respondent, v. John Gibb and Others, Composing the Firm of Frederick Loeser & Company, Appellants.—Judgment of the Municipal Court reversed as against the weight of evidence as to the negligence of the defendants, and new trial ordered, costs to abide the event. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Louis Fishman, Respondent, v. Bernhard Campbell, Appellant.—Judgment of the Municipal Court affirmed by default, with costs. See *Mogile v. Hamburger* (post p. 901), decided herewith. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

David Kratenstein, Respondent, v. Abraham Bernstein, Appellant.—Judgment of the Municipal Court affirmed by default, with costs. See *Mogile v. Hamburger* (post p. 901), decided herewith. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Solomon Mogile, Respondent, v. Emil Hamburger, Appellant.—There being no appellant's brief or appearance of counsel to argue the appeal, judgment of the Municipal Court affirmed by default, with costs. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

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Meyer Guthorn, Respondent, v. McClure Newspaper Syndicate, Appellant.—Order affirmed on argument, with ten dollars costs and disbursements. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Joseph Hexter, Respondent, v. McClure Newspaper Syndicate, Appellant.—Order affirmed on argument, with ten dollars costs and disbursements. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Huntington Tumbler Company, Respondent, v. Herman Cohen and Isaac Cohen, Appellants.—Appeal from judgment of the Municipal Court dismissed by default, with costs. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

In the Matter of the Judicial Settlement of the Account of Proceedings of Richard J. Evans, as Administrator, etc., of Anna Evans, Deceased, Appellant; John M. Donovan, Respondent.—We think that under the circumstances of this case the decree of the Surrogate's Court of Kings county should be modified by striking out the provision for ninety-five dollars and sixty five cents costs against the appellant, and as so modified affirmed, without costs of this appeal. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

Loretta Kelly, an Infant, by Joseph Kelly, Her Guardian ad Litem, Respondent, v. Brooklyn Borough Gas Company, Appellant.—Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event, unless within twenty days the plaintiff stipulate to reduce the recovery of damages to the sum of \$300, in which case the judgment as thus reduced is unanimously affirmed, with costs. No opinion. Woodward, Jenks, Gaynor and Rich, JJ., concurred.

John Leighton, Respondent, v. George W. Dunn, Appellant, and American Nickel Company, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Charles S. Mackenzie, Respondent, v. Security Warehousing Company, Appellant.—Order in so far as appealed from affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

The People of the State of New York ex rel. Oswin J. Mills, Appellant, v. Philip D. Meagher, Justice of the Fourth District Municipal Court, City of New York, Borough of Brooklyn, and Edward Greenfield, Plaintiff in Said Court, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Frederick A. Schiller, Respondent, v. Max Carnot, Appellant.—Judgment of the City Court of Yonkers unanimously affirmed, with costs. No opinion. Present—Woodward, Jenks, Gaynor and Rich, JJ.

Shendel Spiegler, Appellant, v. Jacob Wax, Respondent.—Order of the Municipal Court affirmed, with costs, as there was neither oral argument nor brief presented by the appellant. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Westchester Trust Company, Respondent, v. Paul Kohn, Appellant.—Judgment in so far as appealed from affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

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Alice A. Young, Respondent, v. Samuel Mundheim Company, Appellant.— Judgment of the Municipal Court affirmed on argument, with costs. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

In the Matter of the Application of Julius Hochfelder for Admission to the Bar.— Application granted. Present — Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Samuel Goldinger, Respondent, v. Abraham Cohen and Others, Appellants.— Motion for stay denied, with costs. A doubt being raised on the papers as to the existence of the client represented, the costs should be paid by the attorney personally. Present — Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

In the Matter of the Application and Petition of Michael T. Daly, etc. (Lake Glenelda.)— Motion granted. Present — Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ. Resettle order before Mr. Justice Jenks.

Samuel Mogile, Respondent, v. Edward Hamburger, Appellant.— Motion for reargument denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Shendel Spiegler, Appellant, v. Jacob Wax, Respondent.— Motion denied, with costs. Present — Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ.

Isaac Brown, Appellant, v. Louis Mader, Respondent.— There being no appellant's brief or appearance of counsel to argue the appeal, judgment of the Municipal Court affirmed by default, with costs. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

The Engineer Company, Respondent, v. The Gutta-Percha and Rubber Manufacturing Company, Appellant.— Judgment and order affirmed, with costs. No opinion. Jenks, Hooker, Rich and Miller, JJ., concurred.

William F. Lennon, Respondent, v. Catharine Doring, Appellant.— Judgment of the Municipal Court unanimously affirmed, with costs. No opinion. Present — Woodward, Jenks, Gaynor and Rich, JJ.

Isaac Lublin, Respondent, v. John Henle, Appellant.— Judgment and order affirmed, with costs. No opinion. Hirschberg, P. J., Woodward, Jenks, Hooker and Gaynor, JJ., concurred.

John O'Brien, Respondent, v. William Ulmer, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Hirschberg, P. J., Hooker, Gaynor, Rich and Miller, JJ.

Andrew Rohr, Appellant, v. Joel D. Madden, President of the Village of Ossining, and Others, Respondents.— Appeal dismissed on argument, without costs, on the ground that the question presented is purely academic. Hirschberg, P. J., Woodward, Jenks, Rich and Miller, JJ., concurred.

Gardiner Van Nostrand, Individually and as One of the Executors and Trustees under the Last Will and Testament of John J. Van Nostrand, Deceased, and Others, Respondents, v. Frances Stanton Van Nostrand and Others, Respondents, and Anabel Gardiner Van Nostrand, Appellant.— Appeal dismissed, without costs, on stipulation of parties, and order signed.

Gardiner Van Nostrand, Individually and as One of the Executors and Trustees under the Last Will and Testament of John J. Van Nostrand, Deceased, and

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Others, Respondents, v. Frances Stanton Van Nostrand and Others, Respondents, and Anabel Gardiner Van Nostrand, Appellant.—Appeal dismissed, without costs, on stipulation of parties, and order signed.

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FIRST DEPARTMENT, MARCH, 1907.

MARTHA PAFF, Respondent, v. THE STANDARD GAS LIGHT COMPANY OF THE CITY OF NEW YORK, Appellant.

*Injunction—order granting injunction reversed where allegations on which it is based were disproved at trial.*

Appeal from an order granting temporary injunction.

INGRAHAM, J.: The complaint alleges that the plaintiff resides at No. 287 Willis avenue, borough of the Bronx, and has been for a considerable period of time a customer of the defendant and user of gas in said premises; that the defendant rendered plaintiff a bill for gas consumed between September 17 and October 8, 1906, amounting to 1,300 cubic feet, at the rate of one dollar per 1,000, that the plaintiff tendered defendant payment for 1,300 cubic feet of gas at the rate of eighty cents per 1,000, which defendant has refused to accept, and has threatened to cut off the supply of gas unless the plaintiff pays the bill at the rate of one dollar per 1,000 cubic feet. In opposition to the motion to continue this injunction it appeared without contradiction that the plaintiff never was a customer of the defendant; had made no application to be supplied with gas, and that defendant had made no threat to remove the meter from plaintiff's premises; that one Leonard Paff had applied to the defendant to be supplied with gas, and deposited five dollars as security for gas supplied. There was no affidavit of the plaintiff submitted with the motion, the plaintiff depending upon the allegations of the complaint. As the proof before the trial court showed that the plaintiff was never a customer of the defendant; that she had never made any application to be supplied with gas, and that defendant had never supplied her with gas and never threatened to cut off any gas, it was improper to continue the injunction. The order appealed from must, therefore, be reversed, with ten dollars costs and disbursements, and the application for an injunction denied, with ten dollars costs. Patterson, P. J., McLaughlin, Clarke and Houghton, JJ., concurred. Order reversed, with ten dollars costs and disbursements, and application denied, with ten dollars costs.

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HENRIETTA COBB, Respondent, v. UNITED ENGINEERING AND CONTRACTING COMPANY, Appellant.

*Practice—improper questions to show that defendant in negligence action is insured.*

Appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial made upon the minutes.

Judgment and order affirmed, with costs. No opinion. Present — Patterson, P. J., Ingraham, McLaughlin, Clarke and Scott, JJ. (Dissenting opinion by Clarke, J.)



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CLARKE, J. (dissenting): The plaintiff recovered a verdict of \$25,000. The plaintiff was a woman. The physical disabilities for which she claimed damages were such as to especially excite the sympathies of a jury. They were a cancer of the breast, which had developed some eighteen months after the accident, neurasthenia and bladder trouble. She had suffered an amputation of the breast in an attempt to eradicate the cancer. Whether or not these ills were the direct and proximate result of the defendant's negligence was the seriously litigated question upon the trial. Under such circumstances, irrelevant matter, tending to prejudice or inflame a jury, was sure to be reflected in the size of the verdict. I think the judgment should be set aside because of an improper question asked by counsel for the plaintiff in a patent attempt to get before the jury the fact that the defendant was insured. The courts have so many times admonished counsel that such questions are highly improper, that in my opinion the time has come to enforce the admonitions by reversing a judgment when such questions have been asked. The bar will thus learn that a judgment is worthless if counsel refuses to heed the repeated warnings of the court. (*Wildrick v. Moore*, 66 Hun, 630; *Manigold v. Black River Traction Co.*, 81 App. Div. 381; *Hoyt v. Davis Mfg. Co.*, 112 id. 755; *Cosselman v. Dunfee*, 172 N. Y. 507; *Loughlin v. Brasil*, 187 id. 128.)

FOURTEENTH STREET BANK, Respondent, v. SABINA GERSTEN, Appellant.

*Bills and notes — failure of proof to show authority of defendant to indorse promissory notes as her agent — judgment reversed.*

Appeal from a judgment entered on a verdict and from an order denying motion for a new trial.

SCOTT, J.: Defendant is sued as indorser for her husband on seven promissory notes. As to each note save one, defendant denied her indorsement, and as to the excepted one it is quite evident that her failure to deny the indorsement was due to a copyist's error, but as to that one note she stood on the record as admitting the indorsement. Plaintiff's *prima facie* proof was made by proving by an expert that the indorsement upon the six controverted notes was in the same handwriting as that upon the admitted one. Defendant was permitted to amend so as to deny the indorsement upon the excepted note, after having stipulated that plaintiff had made out a *prima facie* case. It appeared that defendant's husband had attempted through a broker to negotiate these notes with plaintiff; that plaintiff had insisted that they should be indorsed by defendant; that the broker had brought the notes to the place of business of plaintiff's husband, and that the daughter who worked in the shop had written her mother's name on the back of the notes. However it may have been brought about, it is certain that defendant herself never indorsed the notes, but that her name was written there by her daughter. The verdict went to the plaintiff, however, apparently upon the theory that the mother had authorized her daughter to indorse the notes in her name. Of this there is not the slightest evidence. Indeed, all the evidence is directly to the contrary, and there is nothing to support the verdict except suspicion. The judgment should be reversed and a new trial granted, with costs

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to appellant to abide event. *Patterson, P. J., Ingraham, McLaughlin and Clarke, JJ.*, concurred. Judgment and order reversed, new trial ordered, costs to appellant to abide event.

Louis Wollowitz, an Infant, by Hyman Wollowitz, His Guardian ad Litem, Respondent, v. The New York City Railway Company, Appellant.— Order modified by requiring the payment of costs up to the time of the allowance of the amendment and of ten dollars costs and disbursements of this appeal, and as so modified affirmed. No opinion. Settle order on notice.

Charles P. Goldsmith and Isaac Loeb, Respondents, v. Leo Hammel and Others, Appellants.— Judgment and order affirmed, with costs. No opinion.

The People of the State of New York, Respondent, v. New York Building-Loan Banking Company, Respondent. In the Matter of the Application of Charles M. Preston, Respondent, for a Settlement of His Accounts as Temporary and Permanent Receiver of the New York Building-Loan Banking Company, from September 14, 1903, to September 18, 1904. In the Matter of the Claim of Henry A. Taylor, Appellant. In the Matter of the Claim of Albert Rosenlicht, Respondent.— Order affirmed, with costs to the respondents. No opinion.

Cora M. Anderson, Respondent, v. Interurban Street Railway Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Mary Agnes Gleason, Appellant, v. The Northwestern Mutual Life Insurance Company, Respondent.— Judgment affirmed, with costs, with leave to plaintiff to withdraw demurrer on payment of costs in this court and in the court below. No opinion. (Laughlin, J., dissenting.)

Dierck Schomacker, Respondent, v. Max C. Baum, Appellant.— Judgment affirmed, with costs, with leave to defendant to amend on payment of costs in this court and in the court below. No opinion.

The People of the State of New York ex rel. Andrew Sesselman, Relator, v. Theodore A. Bingham, as Police Commissioner of the City of New York, Respondent.— Writ dismissed and proceedings affirmed, with fifty dollars costs and disbursements. No opinion.

Rutherford Realty Company, Respondent, v. Willet F. Cook, Appellant, Impleaded with Simon Lindau.— Judgment affirmed, with costs. No opinion.

David Kidansky and Louis J. Levy, Respondents, v. David Peltyn, Appellant.— Judgment affirmed, with costs. No opinion.

Paul M. Schlichter and William Schlichter, Respondents, v. Guarantee Construction Company, Appellant.— Judgment and order affirmed, with costs. No opinion.

Selena Fetter Royle, Respondent, v. Nathaniel C. Goodwin, Appellant.— Judgment and order reversed, new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, allowance, etc., to \$4,054.37; in which event, judgment as so modified and order affirmed, without costs. No opinion. Settle order on notice.

Dutilh-Smith, McMillan & Company, Respondent, v. Snare & Triest, Appellant.— Judgment and order affirmed, with costs. No opinion.

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Harry Hass, an Infant, by Ascher Hass, His Guardian ad Litem, Respondent, v. Internurban Street Railway Company, Appellant.—Judgment and order affirmed, with costs. No opinion. (Scott, J., dissenting.)

William R. Bohmert and John H. Murphy, Respondents, v. Tower Manufacturing and Novelty Company, Appellant.—Judgment and order affirmed, with costs. No opinion.

John J. Riordan, an Infant, by Daniel J. Riordan, His Guardian ad Litem, Appellant, v. New York Central and Hudson River Railroad Company, Respondent.—Judgment and order affirmed, with costs. No opinion.

John J. Riordan, an Infant, by Daniel J. Riordan, His Guardian ad Litem, Appellant, v. New York Central and Hudson River Railroad Company, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Seaboard National Bank, Respondent, v. The Bank of America, Appellant.—Judgment and order affirmed, with costs, on the opinion of Leventritt, J., in the court below. (Reported in 51 Misc. Rep. 103.)

Henry B. Geffen, Appellant, v. Isaac Schneidler and Irving Bachrach, Respondents.—Order affirmed, with costs. No opinion.

Isaac M. Berinstein, Appellant, v. Maurice Sichel and William Scully, Respondents.—Judgment affirmed, with costs. No opinion.

Morris Mestel, Respondent, v. Borough Park Company, Appellant.—Judgment and order affirmed, with costs. No opinion.

In the Matter of the Application of Charles H. MacRae, Appellant, to Vacate and Set Aside the Decree of Adoption of Madeleine Hope MacRae by James H. Rogers and Elizabeth P. Rogers, Respondents. Jesse F. MacRae, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Henry L. Wardwell and Edward L. Adams, Respondents, v. Benjamin W. Franklin, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Anthony McOwen, Respondent, v. Patrick H. Whalen, Individually and as Surviving Member of the Firm of Whalen & Dunn, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Candee, Smith and Howland Company, Respondent, v. The Metropolitan Surety Company, Appellant, Impleaded with The City of New York and James D. Murphy Company.—Order affirmed, with ten dollars costs and disbursements. No opinion.

David B. Newcomb and Others, Respondents, v. Caleb A. Burbank, Individually, and as Executor, etc., of Ambrose B. Burbank, Deceased, and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. (Clarke, J., dissenting.)

Hester McGarren, Respondent, v. Henry McGoughran, Individually and as Administrator, etc., of Alexander McGarren, Otherwise Known as Alexander McGoughran, Deceased, and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

James A. Grant and Nettie L. Grant, Respondents, v. William C. Greene and Others, Appellants, Impleaded with Cobre Grande Copper Company.—Order affirmed, with ten dollars costs and disbursements. No opinion.

William Crompton, Respondent, v. Charles G. Dobbs and Stanley M. Moran, Composing the Firm of Dobbs & Moran, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Jose R. Alvarez, Respondent, v. Thomas Ceron Camargo, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Christopher J. Egan and Rafael De Florez, Doing Business under the Name of The Egan De Florez Company, Respondents, v. W. F. Doll Manufacturing Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of Delancey Street.— Motion denied, with ten dollars costs.

Van Kannel Revolving Door Company v. W. & J. Sloane, Impleaded.— Motion denied, with ten dollars costs.

In the Matter of Julia Clark, Deceased.— Motion granted, without costs.

Leo Schlesinger v. Charles O. Burns.— Motion denied, with ten dollars costs.

Fernando Hesse v. Daniel M. Griffen.— Motion denied, with ten dollars costs.

In the Matter of Maynard N. Clement.— Motion denied, with ten dollars costs.

Abraham N. Bresel v. Edward W. Browning.— Motion dismissed.

Leo Schlesinger v. Ludwig Lehmaier.— Motion granted.

Herbert G. Tull v. Equitable Life Assurance Society.— Motion denied.

Abraham Elterman v. Jacob Hyman.— Motion denied.

Meyer Stein v. Harry Kooperstein. Dewitt C. Flanagan v. Pietro Rodes. Gustavus A. Rogers v. Joseph Wilkenfeld. Grace Vaughn v. Fred Irwin.— Application in each case denied, with ten dollars costs.

The People of the State of New York v. Robert H. Spriggs.— Motion granted on conditions stated in order.

Thomas F. Burke, Appellant, v. William H. McCarthy, Respondent.— Judgment affirmed, with costs. No opinion.

Jules Mathias, as Administrator, etc., of Jules Arthur Mathias, Deceased, Respondent, v. Union Railway Company of New York City, Appellant.— Judgment and order reversed, new trial ordered, costs to appellant to abide event.

The People of the State of New York v. Joseph Bennett. The People of the State of New York v. Max Block. The People of the State of New York v. Max Frey.— Motion in each case denied on condition that appellant have his case ready for argument at the May term.

The People of the State of New York v. Angelo Doddato.— Motion granted.

Rosie Hochberg v. Bernard Schachner.— Motion granted, with ten dollars costs.

Morris Mestel v. Borough Park Company.— Motion granted.

Frank Sauer v. New York City Railway Company.— Motion denied, with ten dollars costs.

Michael J. Moriarty v. Patrick Sullivan, Impleaded.— Motion denied, with ten dollars costs.

William W. Law v. Elizabeth Law.— Motion granted, with ten dollars costs.

Alice Sturges v. Ida J. Walker and Others.— Motion granted, with ten dollars costs.

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Carl E. Carlson v. Walter D. Munson (2 cases).—Motions granted, with ten dollars costs.

Magdalena Scheu v. Jacob Blun.—Motion denied, with ten dollars costs.

Max Kliger v. Samuel Rosenfeld and Another.—Motion denied, with ten dollars costs.

Joseph A. Davis v. C. C. C. & St. L. R. Co.—Motion granted, with ten dollars costs.

Henry Heileman v. C. C. C. & St. L. R. Co.—Motion granted, with ten dollars costs.

James W. Sterling v. Albert K. Chapin.—Motion denied, with ten dollars costs.

William W. Smith v. Amzi L. Barber.—Motion denied, with ten dollars costs.

Mary B. Hamlin v. Herbert W. Hamlin and Another.—Motion denied, with ten dollars costs.

James A. Grant v. Cananea Copper Company.—Motion granted.

Edwin F. Hatfield v. Isidor Strauss and Another.—Motion granted.

The People of the State of New York v. Charles M. Colmey.—Motion granted.

Guiseppe Abia v. Arthur Bollerman.—Motion granted. Settle order on notice.

Louis A. Riesgo v. James F. A. Clark and Others.—Motion denied, with ten dollars costs.

Theresa Storm and Others v. Sophie McGrover and Another.—Motion denied, with ten dollars costs.

State Board of Pharmacy v. Fred Gasau.—Application granted.

The City of New York v. American Ice Company.—Application granted.

Hugh H. Mawhinney v. Edmund C. Converse, Impleaded.—Motion granted.

Charles Hofferberth v. George Nash.—Motion granted. Settle order on notice.

Eva Van Eaden v. Central Consumers Wine Company.—Motion denied, with ten dollars costs.

Stephen Fiske and Eugene L. Bushe, Individually and as Executors of and Trustees under the Last Will and Testament of Gunning S. Bedford, 2d, Deceased, Respondents, v. Mary E. Wright and Others, Impleaded with Helen Martha Bedford, Individually and as Executrix, etc., of Gunning S. Bedford, 8d, Appellant.—Judgment affirmed, with costs. No opinion. Settle order on notice.

Tillie Goldsmith, Appellant, v. Interurban Street Railway Company, Respondent — Judgment and order affirmed, with costs. No opinion.

James A. Renwick and Edward B. Renwick, as Executors of, and The New York Life Insurance and Trust Company, as Trustee under, the Last Will and Testament of James Renwick, Deceased, Respondents, v. Manhattan Railway Company and Interborough Rapid Transit Company, Appellants.—Judgment modified by reducing amount awarded for fee damage to No. 723 Columbus ave. to \$1,200, and the amount awarded for fee damage to No. 725 Columbus ave. to \$1,400; and by reducing the judgment as entered for rental damage, including interest, costs and allowance, to \$2,382.26, and as so modified affirmed, without costs. No opinion. Settle order on notice.

Winant W. Weir, Respondent, v. Union Railway Company of New York City, Appellant.—Judgment affirmed, with costs. No opinion.

Morris Weintraub, Appellant, v. Nathan Ulman, Respondent.—Judgment affirmed, with costs. No opinion.

Lizzie Hastings Holme, Appellant, v. Leicester Holme, Respondent.—Judgment affirmed, with costs. No opinion.

Thomas E. Greacen, Respondent, v. Frederick J. Poehlman, Appellant.—Judgment affirmed, with costs. No opinion.

Frank Voigtmann and S. Harris Pomeroy, Appellants, v. Hubert B. McLellan and Others, Respondents.—Judgment affirmed, with costs. No opinion.

Louis Bernstein, Respondent, v. Chapin S. Fleet, Appellant.—Judgment and order affirmed, with costs. No opinion.

Ida M. Lawrence, Appellant, v. Alfred J. Cammeyer, Respondent.—Judgment and order affirmed, with costs. No opinion.

Robert H. Hutchinson, Jr., Appellant, v. Caroline S. Ward and Beverley Ward, Her Husband, Respondents.—Judgment and order affirmed, with costs. No opinion. (Ingraham, J., dissenting.)

Albert Lilienthal and Philip N. Lilienthal, Suing in Behalf of Themselves and of All Other Creditors of D. G. Yucngling Brewing Company, a Former Corporation Now Dissolved, Who May Be Similarly Situated, and Who May Come in and Contribute to the Expenses of This Action, Respondents, v. John F. Betz, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Washington Life Insurance Company, Respondent, v. Blair T. Scott, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Charles F. Muller and Others, as Executors of and Trustees under the Last Will and Testament of Thomas W. Evans, Deceased, Respondents, v. The City of Philadelphia and Others, Respondents, Impleaded with Arthur E. Valois, Individually and as Executor of and Trustee under the Last Will and Testament of Thomas W. Evans, Deceased, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of the City of New York, Relative to Acquiring Title, etc., to Macomb's Road, from Its Junction with Jerome Avenue Opposite Marcy Place, to Macomb's Road North of East One Hundred and Seventieth Street, in the Twenty-third and Twenty-fourth Wards, Borough of the Bronx, in the City of New York. United States Title Guaranty and Indemnity Company, Appellant; Anna Blank, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Edward L. Dwyer, Respondent, v. Edward A. Seeley and Roswell E. Briggs, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Charles Schmeiser, Respondent, v. James H. Mansfield, Appellant, Impleaded with John T. Mansfield and Rosetta I. Bressler.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Western Candy and Bakers' Supply Company, Respondent, v. Louis Ginocchio and Others, Doing Business as United Fig and Date Company, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

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Samuel R. Smith, Respondent, v. Frank E. Anderson, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Louis Bauer, Appellant, v. Henrietta M. Parker, as Executrix of John L. Macaulay, Deceased, and Others, Impleaded with Euphemia A. Hawes, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. (Clarke, J., dissenting.)

Knickerbocker Trust Company, Respondent, v. Charles C. Galbraith, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Frank Sauer, Appellant, v. New York City Railway Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Mary E. McNulty, Respondent, v. Patrick J. McNulty, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

William Howell, Respondent, v. The New York Herald Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion.

Abraham N. Bresel v. Edward W. Browning.— Motion denied on condition that appellant have his case ready for May term.

William Miller v. Thomas A. Nevins.— Motion denied.

Leo Schlesinger v. Charles O. Burns, Impleaded.— Motion granted, with ten dollars costs.

The People of the State of New York v. Lena Brecht. The People of the State of New York v. John Bryan and Another. The People of the State of New York v. Peter Markowitz. The People of the State of New York v. Jacob Goldberg. The People of the State of New York v. Ernest P. Sattckau.— Motion denied in each case on condition that appellant have case ready for argument at the May term.

Rutherford Realty Company v. Willet F. Cook.— Motion denied, with ten dollars costs.

The People of the State of New York v. George B. McClellan.— Motion granted; question certified.

John G. Carlisle v. National Surety Company.— Motion denied, with ten dollars costs.

Wilson R. Hunter v. Mutual Reserve Life Insurance Company.— Motion granted.

John Townshend v. Joseph P. Keenan, Impleaded.— Motion denied.

James D. Smith, Individually, etc., v. David Stevenson Brewing Company.— Motion granted; questions certified.

Samuel Melker v. The City of New York.— Motion granted.

Edward R. Dunham v. Hastings Pavement Company.— Motion granted; questions certified.

James McLean v. George Griot and Another.— Motion denied.

Sigmund Werner v. Corporation Liquidating Company.— Application denied, with ten dollars costs.

Sigmund Werner v. Corporation Liquidating Company.— Motion for stay denied, with ten dollars costs. Settle order on notice.

Max Kliger v. Daniel Rosenfeld.— Motion denied, with ten dollars costs. Settle order on notice.

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Caroline Baecht v. Louis Hevesy.—Motion for restitution denied, without costs. Settle order on notice.

Caroline Baecht v. Louis Hevesy.—Motion for resettlement granted, without costs. Settle order on notice.

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THIRD DEPARTMENT, MARCH, 1907.

Albany Industrial Company, Respondent, v. Jonas M. Kilmer, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Anna Burke, as Administratrix, etc., of Benjamin F. Burke, Deceased, Respondent, v. George Holtzmann, Appellant.—Motion granted.

Victoria B. Dobson, Respondent, v. Village of Oneida, Appellant.—Motion denied.

Foster Dickinson, by Charles A. Dickinson, his Guardian ad Litem, Appellant, v. Leonora Blake and Jonas Townsend, Respondents, Impleaded with George Dickinson and Others.—Motion denied.

Mason J. Hatch, as Administrator, etc., of Theresa Hatch, Deceased, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment unanimously affirmed, with costs. No opinion.

Erastus J. Huntington, Respondent, v. Hudson Valley Railway Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Suzette Jackson, Respondent, v. Dewitt C. Moore, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Edwin Kirnan, Appellant, v. The New York and Ottawa Railway Company, Respondent.—Judgment unanimously affirmed, with costs. No opinion.

In the Matter of the Judicial Settlement of the Accounts of Peter Minkler, as Administrator, etc., of Antoinette Minkler, Late of the Town of Chazy, Deceased, Respondent. Orren E. Minkler, Appellant.—Decree unanimously affirmed, with costs. No opinion.

In the Matter of the Application of Harry deF. Hilliard for Admission to the Bar of this State.—Application granted.

In the Matter of the Application of Avery S. Wright, Appellant, for a Writ of Mandamus Directing Otto Kelsey, as State Comptroller, Respondent, to pay Salary.—Motion denied.

The People of the State of New York, Respondent, v. Walter A. Duffy, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

The People of the State of New York ex rel. Beaverkill Stream Club, Appellant, v. Millard Knapp and Others, Assessors of the Town of Hardenburg, Respondents.—Final order unanimously affirmed, with costs. No opinion.

Palmer Ryer, Respondent, v. City of Cortland, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Melissa M. Rose, Respondent, v. Henry W. Misner, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Charles E. Sargent, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.



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Third Department, March, 1907.

**The Village of Waverly v. The Waverly Water Company, Fred A. Sawyer, as Trustee, etc., and George H. Goff.**—Motion for leave to go to Court of Appeals granted, and question certified as follows: Was it necessary for the plaintiff, before beginning this action, to take the proceedings and to comply with chapter 723 of the Laws of the State of New York for the year 1905, and to procure the consent of the State Water Supply Commission, as in said act required?

**Ogle T. Warren and Others, as Executors, etc., of George B. Warren, Deceased, Respondents, v. Ocean View Cemetery, Impleaded with Charles C. Dickinson, Appellant.**—Judgment unanimously affirmed, with costs. No opinion.

**Clarence L. Barber, as Assignee of Horace M. Hooker and David J. McGown, Judgment Creditors, Plaintiff, v. Curtis A. Barnum, Judgment Debtor, Appellant; Chatfield Leonard, as Receiver of the Property of Curtis A. Barnum, Respondent.**—Decision amended so as to read as follows: Order reversed, without costs, and motion denied, without costs. Opinion by Cochrane, J. All concurred; Parker, J., not sitting. (See 117 App. Div. 325.)

**Hewitt Boice, Respondent, v. The Municipal Telegraph and Stock Company, Appellant.**—Motion denied.

**William R. Fuller, Respondent, v. The Municipal Telegraph and Stock Company, Appellant.**—Motion denied.

**Fred W. Hollenbeck, Appellant, v. Albert C. Greene, Respondent.**—Motion granted, with ten dollars costs, unless the appellant, within twenty days, procures the case to be served and filed and pays the respondent ten dollars costs, in which event motion denied, without costs.

**In the Matter of Edwin D. Brandow, an Attorney.**—Application granted, and said Edwin D. Brandow is suspended from practice as an attorney and counselor at law for the period of one year.

**Fuller W. Nye, Appellant, v. Malone Paper Company, Respondent.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**William W. Wheeler, Respondent, v. The State of New York, Appellant.**—Judgment unanimously affirmed, with costs. No opinion.

**Grover C. Wood, Appellant, v. Lawson B. Norman and George N. Coon, Respondents.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**Walter L. Wilhelm, Respondent, v. Fuller & Warren Company, Appellant.**—Motion granted, with ten dollars costs, unless the appellant, within twenty days, procures the case to be signed and filed and pays the respondent ten dollars costs, in which event motion denied, without costs.

**John Zeiser, Respondent, v. Jacob Cohn, Impleaded with Mark Cohn, Individually and as Executor, etc., of Theresa Cohn, Deceased, Appellant.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**The People of the State of New York, Respondent, v. Cornell Van Gaasbeck, Appellant.**—Decision amended so as to read as follows: Conviction and judgment reversed on the law and new trial ordered in the County Court of Ulster county, the court having examined the facts and found no errors therein. Opinion by Kellogg, J. All concurred. (See 118 App. Div. 511.)

## FOURTH DEPARTMENT, MARCH, 1907.

JOHN J. BARRON, as Administrator, etc., Appellant, v. LEONARD A. LANCE, Respondent.

*Sale — action upon merchant's account — evidence showing debt.*

Appeal from a judgment entered in the county of Jefferson July 16, 1906, in favor of the defendant, for costs, upon the report of a referee.

SPRING, J.: The action is upon a merchant's account commenced by the administrator of Mary E. A. Clark, deceased, who for years carried on a small country store at Point Peninsula in Jefferson county. The defendant purchased goods on credit of Miss Clark, and the administrator claims the books now show on this account a balance of \$207.95. The books were received in evidence, although there was considerable testimony *pro* and *con* over the question whether Miss Clark kept honest accounts. We are satisfied that there is something unpaid on this account. It commenced back in 1890 and was carried along on the day book until it amounted to \$109.07 in April, 1894. A new pass book was then commenced, and this sum was not carried forward on the new book. On the ledger it was not brought forward, but a new account was commenced. In March, 1896, the old account was added in on the ledger, and the balance then due was given as \$158.14. The separate items for the ensuing year to April, 1897, are set out on the ledger, and all the charges are then grouped, and the balance carried along. The defendant impugned only one of these charges against him, and that is a barrel of salt at one dollar and twenty-five cents. The items are given along with the date for each charge, and apparently the account was carefully kept. Every payment to which the defendant testified, except one, is found among the credits. The defendant testified that he paid to the father of the intestate twenty dollars to apply on this account, the date of which he was unable to state, and no credit for that sum appears on the books. While the defendant, in a general way, testified to payments, yet he gave no date or sum, except to those for which he was given credit. There are errors in the entries on the books, but they are trivial in amount, are palpable, and evidently unintentionally made. The referee, in his opinion, states that the defendant "probably \* \* \* owes the plaintiff something," but he is not able to ascertain the amount. It seems to us, on the evidence appearing in the record, the balance can be ascertained and credit given to the defendant for everything to which he is entitled. The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event. All concurred. Judgment reversed and new trial ordered, with costs to the appellant to abide the event.

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Fourth Department, March, 1907.

BUCKWALTER STOVE COMPANY, Appellant, v. FRANK J. STRATTON and CARL E. TUCKER, as Receiver of the Estate of FRANK J. STRATTON, Respondents.

*Sale — reinvestment of title in vendee — rights of trustee in bankruptcy of the vendee — Personal Property Law, § 25.*

Appeal by the plaintiff from a judgment of the County Court of Niagara county upon a verdict for the defendants directed by the presiding judge, entered in the clerk's office of Niagara county on the 11th day of July, 1903, and from an order entered in said clerk's office on the 5th day of June, 1906, denying the plaintiff's motion for a new trial made upon the minutes.

The action is in replevin and the controversy is over the ownership of certain stoves.

KRUSE, J : The evidence is sufficient to warrant a finding that although there was originally an absolute sale of the goods in question by the plaintiff to the defendant Stratton, it was subsequently agreed between them that the plaintiff should be reinvested with the title thereto, and the defendant Stratton should hold the goods on consignment and remit to the plaintiff the proceeds from the sale thereof. It was, therefore, erroneous to direct a verdict against the plaintiff, since the codefendant Tucker, the trustee in bankruptcy of the defendant, took no greater interest in or better title to the goods than Stratton had, save as he also represented the creditors of Stratton. Upon that subject the evidence is entirely silent, except as it may be inferred from the fact of bankruptcy upon the part of Stratton. Even if it be assumed that there were creditors represented by the trustee in bankruptcy who could have attacked the plaintiff's title to the goods upon the ground that there was not such an immediate and actual change in the possession thereof as section 25 of the Personal Property Law\* requires to effect a valid sale as against such creditors, the facts and circumstances were such as to require the submission of that question to the jury. The judgment and the order denying the motion for a new trial should be reversed and a new trial granted, with costs to the appellant to abide the event. All concurred. Judgment and order reversed and new trial ordered, with costs to the appellant to abide event.

GRANT D. CARMER, Respondent, v. ORILLA C. RHODES, Appellant.

*Injunction to restrain the execution of a warrant of dispossession issued in summary proceedings.*

Order affirmed, with ten dollars costs and disbursements. All concurred, except Spring and Kruse, JJ., who dissented in a memorandum by Kruse, J.

KRUSE, J. (dissenting): I dissent. The plaintiff in this action was the defendant in the summary proceeding which he attacks. He appeared therein, filed an answer to the petition, contested the same and was beaten. The real controversy between the parties was whether the plaintiff's term, which concededly expired on the 1st day of May, 1906, was extended for another year as claimed by the plaintiff, or whether he was holding over after the expiration of said

\* Laws of 1897, chap. 417. — [REP.]

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term. The plaintiff contended that a new lease was executed by the agent of the owners, and proffered to him, which he did not execute; he claims, however, that the agent stated to him that if he remained in possession he would be deemed to have ratified the lease, and that he did remain in possession and elected to ratify the same. That issue was tried and determined in the summary proceeding adversely to the plaintiff, and thereupon the order was made and the warrant to dispossess the plaintiff was issued, the enforcement of which he now seeks to enjoin. If, in any view of the case, as disclosed by the complaint and the papers in this record, the plaintiff is entitled to such relief, manifestly the injunction order should be retained until the trial and determination of the issues in this action, but I fail to see how he can possibly succeed. Every question involving the merits could have been and was actually tried in the summary proceedings. Whatever redress the plaintiff has by way of reviewing the adjudication in the summary proceedings is limited to the appeal which he has taken to the County Court, and which, so far as the record shows, still remains undetermined. I do not think this action can be maintained. (*Knox v. McDonald*, 25 Hun, 238; *Jessurun v. Mackie*, 24 id. 624; *Baptist Mission Society v. Potter*, 20 Misc. Rep. 191.) The contention is also made by the plaintiff that the description contained in the petition is insufficient. The petition is not contained in the record. The complaint itself describes the premises with sufficient definiteness and certainty, and alleges that a warrant was issued directing the constable to remove the tenant therefrom. While it is stated in the complaint that the plaintiff objected upon the ground that the justice did not have jurisdiction, for the reason that the petition did not properly describe the premises, it fails to show that the description was actually deficient, and beyond that the summary proceeding was tried on the merits. I think the order sustaining the preliminary injunction should be reversed and the injunction order vacated and set aside. Spring, J., concurred.

Martha Wahl, Appellant, v. City of Niagara Falls and Others, Respondents.— Judgment affirmed, with costs. All concurred.

Carrie A. Moore, Respondent, v. City of Lockport, Appellant.— Judgment and order affirmed, with costs. All concurred.

Michele Gaudioso, Respondent, v. Lathrop, Shea & Henwood Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

Max Bachman, Appellant, v. Horace G. Oliver, as, etc., Defendant. William E. Hoyt, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred; Robson, J., not sitting.

Dunbar & Sullivan Dredging Company, Respondent, v. The Delaware and Hudson Company, Appellant.— Judgment and order affirmed, with costs. All concurred, except Williams, J., who dissented.

David H. Munro, Appellant, v. Wells Brothers Company, Respondent.— Motion for reargument denied, with ten dollars costs and disbursements. Motion for leave to appeal to the Court of Appeals denied.

Mary Agnes Barry, etc., Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.— Motion for reargument denied, with ten

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dollars costs and disbursements. Motion for leave to appeal to the Court of Appeals denied.

Joseph Foster, Jr., Respondent, v. International Paper Company, Appellant.— Motion for leave to appeal to the Court of Appeals granted. Williams, J., not sitting.

Nicholas C. Fries, Appellant, v. John P. Fries and Others, Respondents.— Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted and questions certified.

In the Matter of the Application of the City of Buffalo to Acquire Lands under the Waters of Buffalo River for the Purpose of a Public Highway.— Motion for leave to appeal to the Court of Appeals granted. Questions to be certified for review to be settled by and before Mr. Presiding Justice McLennan on two days' notice.

Florence E. Farmer, as Administratrix, v. The New York Central and Hudson River Railroad Company.— Motion to resettle order denied, without costs.

Mary A. Lodge, Appellant, v. Thomas Moxey, Individually, etc., Respondent.— It appearing that appellant has failed to file and serve her printed papers on appeal as required by rule 41,\* and it not having been shown that a case containing exceptions is necessary for the hearing and disposition of said appeal, respondent's motion to dismiss the appeal herein is granted, with ten dollars costs.

Henrietta Pohlman, Appellant, v. Louise F. Schloezer, Respondent.— It appearing that appellant has failed to file and serve her printed papers on appeal as required, and it not having been shown that a case containing exceptions is necessary, respondent's motion to dismiss the appeal herein is granted, with ten dollars costs.

William H. Thompson, Appellant, v. Metropolitan Life Insurance Company, Respondent.— It appearing that appellant has failed to file and serve his printed papers on appeal as required, and it not having been shown that a case containing exceptions is necessary, respondent's motion to dismiss the appeal herein is granted, with ten dollars costs.

George N. Smith, Appellant, v. Rudolph Dotterweich, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

In the Matter of the Petition of Thomas Voke and Others, Respondents, for Surplus Moneys Arising on Foreclosure of Mortgage. John W. Winter, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concurred.

Albert J. Wheeler, as Receiver of the German Bank, Respondent, v. Clarence M. Howard and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. All concurred.

United States Condensed Milk Company, Respondent, v. Alfred S. Bucknam and Edwin T. Vanderpoel, Appellants.— Order affirmed, with ten dollars costs and disbursements. All concurred.

C. S. Tapley Company, Respondent, v. E. L. Hasler Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concurred, except

\* General Rules of Practice.— [REP.]

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McLennan, P. J., and Kruse, J., who dissented upon the ground that there is no evidence tending to show that Stephen, upon whom the summons was served, was managing agent of the defendant, or that he was ever held out or represented by the defendant to be such. (*Taylor v. Granite S. P. Assn.*, 136 N. Y. 343; *Coler v. Pittsburgh Bridge Co.*, 146 id. 281.)

Leonard Simkoff, an Infant, by William Simkoff, His Guardian ad Litem, Respondent, v. Lehigh Valley Railroad Company, Appellant.— Judgment and order affirmed, with costs. All concurred, except McLennan, P. J., who dissented on the ground that the finding of the jury that there was an opening between the outside edge of the southerly rail and the sidewalk planking, which was the only negligence submitted to the jury, was against the weight of the evidence, and also because of errors of the court in refusing to charge as requested.

International Text Book Company, Appellant, v. Ernest Rosenburgh, Respondent.— Judgment affirmed, with costs. All concurred.

Matthew F. Walsh, Individually and as Administrator, etc., of Margaret M. F. Walsh, Deceased, Appellant, v. Sarah Denison, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

Mary Lavin, Appellant, v. John A. Thomas, as Executor, etc., of Patrick Lavin, Deceased, and Others, Respondents.— Judgments and order reversed and new trial ordered, with costs to the appellant to abide event. Held, that the direction of a verdict was error. The case should have been submitted to the jury. All concurred.

James Flaherty, as Executor, etc., of Catherine Beach, Deceased, Respondent, v. Lou P. Allis, Appellant.— Judgment reversed, with costs in this and the courts below. Held, that the evidence failed to establish a cause of action in conversion. All concurred.

Frank E. Wallingford, Respondent, v. Harry Kaiser, as Sheriff of the County of Erie, Appellant.— Judgment and order affirmed, with costs. All concurred.

Anna M. Jacobs, as Executrix, etc., of Louis Jacobs, Deceased, Respondent, v. Jay M. Jacobs, Appellant.— Judgment reversed and new trial ordered, with costs to the appellant to abide event. Held, that the court committed error, among other things, in rejecting evidence tending to prove that the plaintiff was not the owner of the property in question. All concurred.

County of Erie, Respondent, v. John W. Neff, Appellant, Impleaded with Rowland J. Conover and Others.— Interlocutory judgment affirmed, with costs, with leave to the appellant to plead over upon payment of the costs of the demurrer and of this appeal. All concurred.

Edward Garvey, Appellant, v. Oldbury Electro-Chemical Company, Respondent.— Order affirmed, with costs. All concurred.

Salvatore Cardino, Appellant, v. Lehigh Valley Railroad Company, Respondent.— Order affirmed, with costs. All concurred, except Kruse, J., who dissented.

William Skinner v. Le Roy Hydraulic Electric Gas Company.— Motion denied, with ten dollars costs and disbursements; Robson, J., not sitting.

William H. Thompson, Appellant, v. Metropolitan Life Insurance Company, Respondent.— Motion denied, without costs, on the ground that the appellant is

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not in default under rule 41\* for the reason that the time within which to serve his printed papers on appeal does not begin to run until the settlement and filing of the case and exceptions on appeal.

Fred Pickett and Clyde Pickett, Appellants, v. John H. Pratt, Respondent.— Judgment reversed, with costs. All concurred, except Spring and Kruse, JJ., who dissented.

Almstead Electric Company, Respondent, v. Frank F. Pulver, Appellant, Impleaded with Others.— Judgment affirmed, with costs. All concurred.

Angeline Baxter, as Administratrix, etc., of Charles E. Baxter, Deceased, Respondent, v. Auburn and Syracuse Electric Railroad Company, Appellant.— Judgment and order affirmed, with costs. All concurred, except McLennan, P. J., who dissented on the ground that plaintiff's intestate was not shown to have been free from contributory negligence.

Pearl Timerson, as Administratrix, etc., of George Timerson, Deceased, Appellant, v. Eugene Hapeman and Cornelius Goodfellow, Respondents.— Judgment and order affirmed, with costs. All concurred, except Spring and Kruse, JJ., who dissented.

Ludwick Matecki, Respondent, v. Michael Oster and Andrew G. Oster, Appellants.— Judgment and order affirmed, with costs. All concurred.

John Odebralski, Appellant, v. Michael Odebralski, Respondent, Impleaded with Others.— Judgment affirmed, with costs. All concurred.

James A. Roberts, as Receiver, etc., of the Metropolitan Mutual Savings and Loan Association, Respondent, v. Mathew Wind, Impleaded with Anna T. Wind, Appellant.— Judgment affirmed, with costs. All concurred.

Henry F. Brick, Respondent, v. Matthew Favilla and Jennie Favilla, Appellants.— Judgment and order affirmed, with costs. Held, that the undisputed proof shows that plaintiff was entitled to recover for thirteen days' rent; that the verdict of "no cause of action" was unauthorized and the judgment entered thereon was properly reversed by the County Court. All concurred.

Nathan S. Beardslee and Henry R. Bristol, Stockholders of the Warsaw Blue Stone Company, Who Sue on Behalf of Themselves and All Other Persons Similarly Situated with Themselves, Respondents, v. The Warsaw Blue Stone Company, Impleaded with S. Benedict Whitlock, Individually and as a Director Thereof, Appellant.— Order modified so as to provide that the plaintiff be required to make his complaint more definite and certain by stating what "other of the things" have resulted in damage, as stated in the allegation of the 5th subdivision thereof, and as so modified affirmed, without costs of this appeal to either party. All concurred.

Edward Bringley, Respondent, v. John Grape, Appellant.— Order reversed, with ten dollars costs, and motion granted, without costs. All concurred.

In the Matter of the Administration of the Estate of Nathaniel Stewart, Deceased. Edwin M. Harvie, as Administrator, etc., of Nathaniel Stewart, Deceased, Appellant; Clark A. Stewart, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

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\* General Rules of Practice.— [REP.]

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William L. Dobbin, Respondent, v. William C. Lautner, Appellant.— Judgment affirmed, with costs. All concurred.

Marvilla J. Rowley, Respondent, v. The New York Central and Hudson River Railroad Company and the Rome, Watertown and Ogdensburg Railroad Company, Appellants.— Judgment affirmed, with costs. All concurred.

Orlando S. Osterhout, Appellant, v. Bridget Hodge, Respondent.— Order reversed, with ten dollars costs and disbursements, and matter remitted to the County Court for determination. Held, that the affidavits of the plaintiff should have been considered by the County Court, together with the other papers. All concurred.

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An order sustaining or overruling a demurrer is not appealable as it is not one of the orders enumerated in section 1347 of the Code of Civil Procedure and the appeal is from the judgment only. *Smith v. Thompson*, 6.

2. *Decision of General Term res adjudicata on subsequent appeal to Appellate Division.* The old General Term had power to reverse the decision of the Special Term upon the law and direct it to make an interlocutory judgment in accordance with its decision based upon facts found by the trial judge. Such former decision affirms the facts, but reverses upon the law and is *res adjudicata* and not to be reviewed by the Appellate Division upon a subsequent appeal. *Jones v. Jones*, 148.

3. *Case — when appellant entitled to have evidence excluded on objection of respondent appear in case.* When in an action to recover for services rendered, the defendant introduces a receipt signed by the plaintiff and the plaintiff's explanation as to why he signed the paper is excluded on the objection of the defendant, the plaintiff is entitled to have the excluded question contained in the printed case in order that the defendant cannot reverse the judgment on the ground that there was a failure of evidence when the same was excluded on his own objection. This is so, although the plaintiff's exceptions to the exclusion of the evidence were not well taken. *Selah v. New York Times Co.*, 384.

4. *Inconsistent findings — judgment based on findings that mortgage was taken in good faith and without notice, and that the mortgagees had knowledge of the fact that plaintiff claimed a lien upon the premises.* When findings, whether made by the court as its own conclusions or at the request of an unsuccessful party, are inconsistent, and the determination of the facts involved in the findings is material and necessary to uphold the judgment, the defeated party on appeal is entitled to the benefit of the findings most favorable to his contention, and if the judgment stands without sufficient facts as a basis, it should be reversed.

When on the issue as to whether a mortgage on real estate was accepted by the mortgagee in good faith and without notice of a prior contract whereby the plaintiff was entitled to a conveyance of the lands on the completion of a building thereon, then in course of construction, the court finds, *first*, that the mortgage was accepted by the mortgagees "in good faith and without notice of the contract set forth in the complaint herein or of any other claim or lien of plaintiff's affecting said premises," and, *second*, that the plaintiff had conversations with a member of the firm which was furnishing lumber for the house, which firm subsequently became the mortgagees, in which he stated that the house was being built for him, and that on the plaintiff's request a member of the firm instructed the foreman to make changes in the lumber delivered, etc., the two findings are inconsistent, for upon the latter finding the mortgagees are shown to have had knowledge of facts sufficient to put them upon inquiry as to the plaintiff's claim to the premises. *Hamilton v. Fleckenstein*, 579.

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**ARBITRATION** — *Continued.*

ment of controversies, does not oust the court of jurisdiction nor is it void as against public policy.

When a building contract provides that there are to be no extras unless by agreement of parties or upon written authorization and that stipulation is waived by one party on condition that the other agree to submit certain controversies to arbitration, and the latter party withdraws from the arbitration without cause, he cannot thereafter recover for extras not furnished on written order. He cannot have the advantage of a waiver of a provision of the contract without complying with the conditions of the contract as modified. *Wyckoff v. Woarms*, 699.

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**ASSIGNMENT.**

1. *Receiver of corporation — action to set aside assignment of trade marks as in fraud of creditors — facts not showing fraud.* Action by a receiver of a corporation to set aside transfers of trade marks and promissory notes upon the ground that they were made to hinder and defraud creditors and constituted an unlawful preference.

It appeared that the plaintiff's corporation was engaged in the sale of patent medicine under registered trade marks, the remedies being manufactured by the defendant to whom the corporation was indebted; that to secure the indebtedness and to procure a loan and further credit the corporation transferred promissory notes to the defendant with collateral security; that thereafter the unpaid notes were surrendered to the corporation and other notes secured by an assignment of the trade marks accepted; that thereafter the corporation's trade marks and business were sold to third persons subject to the defendant's lien, and that the purchaser paid the notes whereupon the trade marks were reassigned to him by the defendant.

*Held*, that a judgment declaring the assignment void as made to hinder or defraud creditors was wholly unsupported by the evidence;

That the fact that it subsequently turned out that the corporation was insolvent did not of itself show that the assignments were made for the purpose of giving a preference prohibited by section 48 of the Stock Corporation Law;

That in order to bring the case within the statute it must be shown that the assignments were given and payments made by the corporation with the "intent" to giving preferences and because insolvency existed or was in contemplation;

That where the evidence is capable of an interpretation equally consistent with the absence of wrongful intent that meaning must be ascribed to it. *Van Slyck v. Warner*, 40.

2. *Receiver of corporation — action to set aside assignment of trade marks as in fraud of creditors — facts not showing fraud.* Where in an action by the receiver of a corporation to set aside an assignment of corporate property as being in fraud of creditors it appears that the assignee paid cash therefor and assumed the debts of the corporation, which had done a losing business, and that out of the sum received the corporation paid debts, a finding that the assignment was fraudulent is unwarranted even though the assignee sold the property for double the amount five years after his purchase. *Van Slyck v. Woodruff*, 47.

3. *Same — equity.* Moreover, the receiver of the corporation will not be heard to say that the assignment was fraudulent, if, having set aside the assignment in a prior action, he sold the same property at auction for a nominal sum. One who comes into a court of equity must come with clean hands.

A purchaser from the original assignee of the corporation who took the property with knowledge that the prior judgment setting aside the assignment had been reversed takes good title; especially so, when a search shows that his vendor's title had not been questioned for four years. *Id.*

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1. *Action to enforce lien after settlement by client—maintenance—evidence insufficient to set aside retainer as invalid.* An attorney's written retainer cannot be held to be invalid as procured by a promise to pay the client a valuable consideration in violation of section 74 of the Code of Civil Procedure, when the evidence does not show that the attorney's agent who procured the contract and who intimated that the plaintiff would receive help in his household expenses, made such promise before the retainer was signed or that the client was induced thereby to execute it. *O'Neill v. Campbell*, 64.

2. *Summary proceedings to compel attorney to pay over—reference to hear and determine not authorized.* In a summary proceeding on a petition of a client to compel an attorney to pay over moneys the court must determine the controversy, and a reference is merely for the purpose of assisting the court.

Such referee has no power to hear and determine, and even when by error authorized to determine, no judgment can be entered except by direction of the court.

Section 1228 of the Code of Civil Procedure, providing for the entry of judgment upon the report of a referee, has no application to such special proceeding. *Matter of Cartier v. Spooner*, 342.

3. *Judgment—motion to set aside.* A motion to set aside a judgment in such proceeding erroneously entered on the report of a referee without confirmation by the court is not governed by section 1283 of the Code of Civil Procedure requiring that a motion to set aside a judgment must be made within one year from its entry, nor are the provisions of sections 1290 and 724 of the Code applicable. *Id.*

4. *Demurrer to counterclaim raises sufficiency of complaint—truth of allegations of answer not considered in determining sufficiency of complaint.* Although a demurrer to an answer searches the record and raises an issue as to the sufficiency of the complaint, when the complaint has been held not to state a cause of action, the decision will be reviewed as if made upon demurrer to the complaint, and the truth of the allegations of the answer will not be assumed. *Nichols v. Riley*, 404.

5. *When attorney purchasing client's interests holds the same impressed with trust.* An attorney at law neither during the continuance of his employment nor after its termination can, without the client's consent, avail himself of the information so acquired and purchase property, the sale of which he was once employed to prevent. *Id.*

6. *Same.* When a complaint by clients against their former attorney alleges that the defendant promised in order to protect their interests to purchase certain life insurance policies on the life of the clients' father which were held by a trust company which was the guardian of the clients, and that the purchase was

**ATTORNEY AND CLIENT** — *Continued.*

to be made for their account and benefit, and that to effectuate the purchase the clients assigned their interest to the defendant but that the defendant neglected to purchase the policies when sold and bought in at public sale by the trust company, and that he afterwards secretly purchased the policies of the receiver of the trust company on its insolvency, it states a cause of action. The policies so purchased, in the hands of the defendant or his assignee with knowledge, are impressed with a trust for the benefit of the clients. *Id.*

7. *Same* — *facts not stating counterclaim.* It is no defense to such action to allege that the defendant, as part of the transaction in which he purchased the policies, purchased also two deficiency judgments held by the trust company against the plaintiffs, which judgments he seeks to counterclaim, for if the policies be impressed with a trust so too the judgments. *Id.*

8. *Action for value of legal services — when direction of verdict error.* In an action to recover the value of legal services the value of the services is a question of fact and a direction of a verdict for the plaintiff is error.

When in an action by an attorney to recover the value of services rendered it appears that they were performed under a contract giving him a percentage of the recovery, he is not entitled to recover on a *quantum meruit* but only under the contract. *McDonald v. De Vito*, 566.

9. *Same* — *client not liable when attorney repudiates contract for contingent fee.* When an attorney repudiates a contract for a contingent fee, the client is under no obligation to proceed with the action, and is not liable for the value of services rendered. *Id.*

Agreement to collect gambling debts for contingent fee contrary to public policy.

*See* CONTRACT, 17.

Improper assumption by attorney of responsibility for complaint.

*See* NEGLIGENCE, 8.

**ATTORNEY-GENERAL.**

Discretion in bringing quo warranto — determination of predecessor is not *res adjudicata*.

*See* QUO WARRANTO.

*See* DISSOLUTION.

*See* RECEIVER.

**BAILEMENT.**

1. *Action to recover pledged stock — notice of sale by bailee withdrawn — second notice of sale necessary.* A bailee who, after notice that he intends to sell pledged stock, waives his right and gives further time to the pledgor cannot recall his waiver without further notice to enable the pledgor to protect the pledge.

When under such circumstances the bailee sells without second notice the pledgor is entitled to recover the stock, and there is no necessity that he keep a tender of payment alive by paying the money into court. *Furber v. National Metal Co.*, 268.

2. *Same* — *facts showing fraud.* The plaintiff pledged certain shares of mining stock with the defendant corporation as security for the payment of a demand promissory note. He left this State to meet the president of the corporation at the mines in Mexico where a serious emergency had arisen. The treasurer of the company, knowing of the plaintiff's departure on the corporate business, sent a note to his New York office stating that the stock would be sold on a date stated. The plaintiff being telegraphed by his office of the contemplated action, told the president of the company that he would leave immediately for New York in order to protect his stock, but was induced not to do so on the plea that his presence was necessary at the mines. He was promised an extension of time for payment, but the period was left indefinite. Subsequently during his absence the plaintiff's stock was sold without further notice. On all the evidence,

*Held*, that a clear case of unfair dealing was presented and that under the rules aforesaid the plaintiff was entitled to recover the stock. *Id.*

Right of vendor of hops after tender of delivery to store hops with warehouseman and sue for purchase price.

*See* SALE, 8.

**BANKING.**

1. *Relation between bank and depositor.* The duty of a bank, other than a savings bank, toward depositors is not measured by reasonable care in paying out the amount of the deposit. The relation of banker and depositor is that of debtor and creditor, the deposit becoming the money of the bank and the bank a debtor of the depositor. The bank is in no sense a trustee and the rule as to reasonable care in ascertaining the identity of the person who draws the deposit has no application. The bank is bound absolutely to pay or discharge the liability like any other obligation. *Fricano v. Columbia National Bank*, 567.

2. *Same—erroneous charge as to liability of bank paying out money to person not depositor—estoppel.* Although a depositor by holding out another person as authorized to draw the deposit may be estopped, it is error to charge that the liability of the bank depends on the carefulness or good faith of the cashier in making payment without also submitting the acts of the depositor claimed to constitute an estoppel. *Id.*

3. *Party—liquidating agent of national bank may be sued in State court for accounting.* The liquidating agent of a national bank appointed by the stockholders under the authority of section 3 of the act of Congress of June 30, 1876, is a trustee for the benefit of the stockholders, and although he is under the control of the Federal courts as to compromising debts and filing the account of his proceedings he may nevertheless be sued in the Supreme Court of the State of New York by a stockholder for an accounting in equity.

Such agent does not occupy the position of a receiver and he may sue and be sued without leave of court. *Ingold v. Gilmore*, 727.

Deposit of money payable to depositor or his brother.

*See* GIFT.

**BANKRUPTCY.**

1. *Preference by insolvent corporation contrary to section 48 of the Stock Corporation Law.* Although section 48 of the Stock Corporation Law prohibits a preference by an insolvent corporation without regard to the creditor's intent or his knowledge as to the actual or imminent insolvency of the debtor, yet a creditor holding security given in the regular course of business, and not in contemplation of insolvency, who releases the same, on payment in full is entitled to protection even though unsecured creditors get nothing. *Wright v. Gansevoort Bank*, 281.

2. *Same—secured creditor entitled to preference to amount of security released.* But a creditor is entitled to be paid in full only to the extent of the collateral held by him.

Thus, when the creditor of a corporation holds notes indorsed by the president of the corporation, and partially secured by mortgages executed on lands owned by the president and his wife, it will be protected on receiving payment by the corporation without knowledge of its insolvency, to the amount of security surrendered, if it cannot be restored to its former position.

When mortgages partly on the lands of the president of the corporation and partly upon the land of his wife have been given as collateral security for the indebtedness of the corporation, said mortgages as between the creditor and the insolvent corporation are the property of the latter, and in returning the security of the president on payment by the corporation the security is released to the latter. *Id.*

3. *Same—not entitled to full payment when recourse against surety still subsists.* But as to so much of the debt evidenced by the corporate notes as is merely secured by the indorsements of the president of the corporation and his wife the creditor is not entitled to full payment by the insolvent corporation as against other creditors for no security has been surrendered, the rule being that the creditor may still look to the indorsers. *Id.*

4. *Unlawful preference by corporation—Stock Corporation Law, section 48, construed.* To constitute an unlawful preference by an insolvent corporation under section 48 of the Stock Corporation Law, it is only necessary that the corporation shall be insolvent or its insolvency imminent and that the payment shall have been made or the security given with the intent on the part of the debtor to give a preference. The intent of the creditor or his knowledge as to the insolvency of the debtor or the intent of the debtor is immaterial. If, however, the creditor parts with a valuable consideration and is without notice of the

**BANKRUPTCY — Continued.**

insolvency or its imminence, he stands in the position of a purchaser for value without notice, and the transaction is not avoided.

It is not necessary to uncover the "mind" of an insolvent corporation in order to ascertain its intent, and when, being insolvent, it gives all its assets to one creditor, leaving claims amounting to \$10,000 entirely unprovided for, the facts show an intent to give an unlawful preference.

If a creditor holding security innocently and in the due course of business accepts payment from the insolvent corporation and surrenders security to which it cannot be restored, the payment is not preferential or contrary to the statute. If, however, no security is surrendered the rule does not apply. There is no surrender of security by the payment of a note indorsed by a third person, because recourse against the indorser is not lost if the creditor be required to repay. *Perry v. Van Norden Trust Co.*, 288.

5. *Same* — *indorser not discharged when payment by maker is unlawful preference.* Ordinarily, payment of a note by the maker terminates the liability of the indorser, but the receipt of a preferential payment of an indorsed note contrary to the statute is in contemplation of law no payment and the indorser is not released. *Id.*

6. *Facts showing unlawful preference — bills and notes.* A business corporation liable on four promissory notes indorsed by a third person and held by the defendant trust company and being insolvent, sold all its property and deposited \$1,000 with the defendant at the same time borrowing \$3,000 which it credited on its deposit account and secured by an assignment of its outstanding accounts. The insolvent corporation thereupon drew its check for its total deposit and gave it to the defendant in payment of the unmatured notes leaving itself without assets to meet the claims of other creditors. On all the evidence,

*Held*, that the transaction was an unlawful preference obnoxious to the statute. *Id.*

7. *Pleading — when complaint sufficiently alleges capacity of trustee to sue.* When in an action by a trustee in bankruptcy to recover property alleged to have been wrongfully transferred by the bankrupt, the complaint, after setting out bankruptcy proceedings filed in the District Court of the Northern District of this State and that the insolvent was by that court duly adjudged a bankrupt, states that the plaintiff was "duly appointed the trustee \* \* \* by an order duly made on the 16th of March, 1905," the capacity of the plaintiff to sue is sufficiently set forth, for the court may take judicial notice that there is but one clerk's office in the Northern District for New York in the Federal court. Nor is it material that it is not alleged that the order appointing the plaintiff was made by the creditors with the approval of the court or referee or by the court, for the inference is plain that it was made in the bankruptcy proceedings pending in the district and court stated.

Moreover, the pleading may be sustained under section 532 of the Code of Civil Procedure which provides that in pleading a judgment or determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. *Bouton v. Wheeler*, 426.

8. *Same — when causes of action not improperly united.* The complaint set forth three causes of action against the transferees of the bankrupt. The allegations considered, and

*Held*, that the causes of action were not improperly united, having arisen out of the same transaction and all stating facts sufficient to set aside a transfer contrary to the provisions of the Bankruptcy Act. *Id.*

9. *Same — jurisdiction of State courts.* The Supreme Court has jurisdiction of an action brought to set aside an unlawful transfer of property by a bankrupt and to recover the same or the value thereof for the benefit of his creditors. *Id.*

Reinvestment of title in vendee — rights of trustee in bankruptcy of the vendee — Personal Property Law, section 25.

*Buckwalter Shoe Co. v. Stratton*, 915.

**BASTARD.**

When foreign statute legitimatizing children on marriage of parents binding here.

*See* PARENT AND CHILD

**BILL OF PARTICULARS.***See* PLEADING.**BILLS AND NOTES.**

*Irregular indorser — when liable — sections 114 and 118 of the Negotiable Instruments Law construed.* Subdivision 2 of section 114 of the Negotiable Instruments Law, providing that an irregular indorser, when the instrument is payable to the order of the maker, the drawer or bearer, is liable to all parties subsequent to the maker or drawer, does not purport to fix the rights of the various indorsers as between themselves. The latter liability is governed by section 118 of the act which provides that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise.

Hence, an irregular indorser of drafts who indorses in order to give credit to the acceptors under an agreement that he should be liable for goods furnished the acceptors, is liable upon his indorsement when the acceptors fail to pay. *Haddock, Blanchard & Co., Inc., v. Haddock*, 412.

Failure of proof to show authority to indorse promissory notes as agent of defendant.

*Fourteenth Street Bank v. Gersten*, 905.

Secured creditor of corporation not entitled to preference upon notes of the corporation which are indorsed by third parties.

*See* BANKRUPTCY, 3.

Indorser of note not discharged when payment by maker is an unlawful preference.

*See* BANKRUPTCY, 5, 6.

When principal sued upon indorsement may not show fraud.

*See* CONTRACT, 6.

Conversion of corporate check by president — satisfaction by acceptance of obligation of third person.

*See* CONVERSION, 1-3.

Deposit of check with knowledge that prior indorsement was forged.

*See* CRIME, 11.

When unpaid promissory notes given for premiums although accepted at time do not constitute payment.

*See* INSURANCE, 1.

Consolidation of actions upon promissory note.

*See* PRACTICE, 2.

When promissory note constitutes payment — right of third person to rely upon receipt given therefor.

*See* SALE, 5.**BOND.**

Failure of obligee of bond collateral to contract to show damage.

*See* CONTRACT, 7.

Discharge of mechanic's lien upon furnishing a bond by assignee of contractor.

*See* LIEN, 2.**BOOKS AND PAPERS.**

Inspection of.

*See* DISCOVERY.**BUFFALO (CITY OF).**

When laborer in street department not entitled to additional compensation for services as foreman.

*See* MUNICIPAL CORPORATION, 1.**BUFFALO (MUNICIPAL COURT OF).**

Power of justice to grant adjournment.

*See* COURT.



**BUILDING LOAN ASSOCIATION.**

*Withdrawal of member — right to interest.* The articles of a building loan association allowed members to withdraw on written notice and provided that after the expiration of sixty days they should receive the book value of their shares if forty per cent of the dues received raised a fund sufficient for payment.

On the question of the right to interest of a withdrawing member there was no evidence showing the existence of a fund sufficient to pay the plaintiff except between August, 1893, and December, 1895, during which period dues were collected, a percentage of which was applicable to payment.

*Held*, that in the absence of proof bearing on the subject it should be assumed that payment was due December, 1895, and that interest did not run on the plaintiff's claim until January 1, 1896. *Taylor v. Bankers' Loan & Investment Co.*, 27.

**BURDEN OF PROOF.**

*See EVIDENCE, generally.*

**BURGLARY.**

Evidence of previous crime excluded — prejudicial comment by court.

*See CRIME, 7.*

**CARRIER.**

Action against street railroad company for refusal to accept transfer.

*See RAILROAD, 1, 3, 6.*

*See RAILROAD, generally.*

**CASE.**

Upon appeal.

*See APPEAL, 3.*

**CHARGE.**

Of the court.

*See TRIAL, generally.*

**CHARITABLE USES.**

When benevolent corporation entitled to take bequest.

*See WILL, 13.*

Trust for foreign charitable use construed — when foreign unincorporated college cannot take.

*See WILL, 14.*

Trust for educational institutions, etc., upheld — power of Supreme Court to supervise gift to charitable use.

*See WILL, 15-17.*

**CIVIL SERVICE.**

Dismissal of policeman by commissioner upon proceedings had before his predecessor — insufficient grounds for dismissal.

*See MANDAMUS, 2.*

Mandamus by assistant foreman of highways for reinstatement — membership in volunteer fire department must be alleged.

*See MUNICIPAL CORPORATION, 2.*

**CODE OF CIVIL PROCEDURE.**

[For table containing all sections cited and construed in this volume see *ante*, p. xliv.]

**CODE OF CRIMINAL PROCEDURE.**

[For table containing all sections cited and construed in this volume see *ante*, p. xlv.]

**CODE OF PROCEDURE.**

[For table containing all sections cited and construed in this volume see *ante*, p. xliv.]

**CONDEMNATION PROCEEDINGS.**

*See EMINENT DOMAIN, generally.*

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**CONDITIONAL SALE.**

Effect of retaking property upon claim for purchase price.

See SALE, 1.

Failure to file contract of conditional sale — *bona fide* purchaser.

See SALE, 2, 4.

**CONFLICT OF LAWS.**

State court may determine validity of contract to procure legislation.

See CONTRACT, 4.

When foreign statute legitimatizing children on marriage of parents binding here.

See PARENT AND CHILD.

**CONSPIRACY.**

Complaint against president of corporation to recover moneys obtained pursuant to conspiracy.

See PLEADING, 17.

**CONSTITUTIONAL LAW.**

Statute authorizing Park avenue viaduct in New York city construed.

See EMINENT DOMAIN, 6.

Section 141 of the Forest, Fish and Game Law regulating seasons for English pheasants construed.

See GAME LAW, 2.

[For tables of the sections of the United States and New York Constitutions cited and construed in this volume, see *ante*, p. xli.]

**CONTRACT.**

1. *To pool stocks* — agreement allowing members to sell inconsistent therewith. When a plaintiff, suing brokers for refusal to sell certain stock purchased for him as a member of a pool, testifies to an agreement that as a member of the pool he might sell his stock at any time on order, but admits that the right of members of a pool to sell would render it ineffective, and it is shown that he was a financial writer and perfectly familiar with the operation of pools and syndicates, his testimony that his contract entitled him to sell his holdings is so inconsistent with the necessities of a successful pool agreement that a verdict in his favor is against the weight of evidence. *Ridgely v. Taylor Co.*, 10.

2. *Sams*. (Per GAYNOR, J.): The alleged agreement permitting the plaintiff to sell was inconsistent with the pool and a breach of trust or fraud upon his associates and invalid. *Id.*

3. *Executors and administrators* — action on alleged promise of decedent to make legacy in consideration of services. In an action upon an alleged contract by a decedent to make a specific bequest in consideration of services rendered, it appeared that the plaintiff, a cousin of the decedent, performed certain household services for her at various times and had furnished certain meals but no proof was given of the value of the services or meals, the plaintiff making no claim to recover on a *quantum meruit*. Although it was shown that the decedent had kindly intentions toward the plaintiff and had stated that she intended to leave her a legacy, the only proof that the promise was made in consideration of the services and board was the testimony of one witness who stated that the decedent told her "she had already promised" the legacy "for \* \* \* taking care of her and doing her work." On all the evidence,

*Held*, that the complaint was properly dismissed in that the evidence did not show that the alleged promise was not made after the services were rendered and hence was without consideration, and that if it were in consideration of future services it was too indefinite to afford a basis for action;

That the complaint being based on a specific contract and there being no proof showing the value of the services rendered, the plaintiff could not recover on a *quantum meruit*. *Murphy v. Murphy*, 61.

4. *To procure legislation* — conflict of laws. The question as to whether a contract to procure legislation is void upon the grounds of public policy is not a Federal question, but will be determined according to the law of this State. *Dunham v. Hastings Pavement Co.*, 127.

**CONTRACT—Continued.**

5. *Only parties to sealed instrument can sue.* When a contract is under seal only parties to the contract can sue upon it.

Hence, when defendants are sued upon promissory notes indorsed by them and given in payment of a contract under seal for the purchase of stock executed by their agent, a defense that the sale was procured by fraud and misrepresentation is not available when the agent is not a party to the action. *Elliott v. Brady*, 208.

6. *Same—principal and agent.* Principals who are sued as indorsers on a promissory note given in payment of a contract under seal executed by their agent, cannot avoid the force of the rule aforesaid by claiming that being sued as indorsers they may defend by showing that they became such by fraud which induced the execution of the sealed contract. *Id.*

7. *To pay moneys from earnings of mines construed—failure of obligee of bond collateral to contract to show damage—defect of parties.* The defendants purchased mining property for \$175,000, under a contract whereby they were required to pay \$175,000 in addition whenever the defendants or their assigns should receive the same as net earnings or dividends from working the mining claims, or from any sale thereof, or from any corporation which should succeed to the ownership of the mines. The defendants also agreed to develop the mines and employ at least ten men until the \$175,000 had been paid from the net earnings. To secure the performance of the contract a bond was given providing that if work on the mines should be stopped the balance due the obligee should bear interest payable out of the net earnings, in which case the bond should not be forfeited, but that in case of forfeiture the obligee or his assigns should be deemed to be damaged in a sum equal to the balance unpaid, which sum should be treated as stipulated damage. It was also provided that in case of forfeiture the obligors could reconvey the interest in the mines to the obligee, which reconveyance should be in full satisfaction of the penalty incurred for forfeiture.

*Held*, that there was no absolute agreement on the part of the obligors to pay the balance of \$175,000 except as the same might be earned by working the mines;

That the obligors were required to work the mines to insure the realization of earnings and dividends to apply to the payment of the \$175,000;

That an action upon the bond, if maintainable, must be based upon the failure of the obligors continuously to work the mines, and for the breach of that covenant the \$175,000 must be considered as a penalty, the plaintiff being entitled to recover only so much damage as could be shown to have resulted from the breach;

That unless the obligee could show that the obligors could have earned profit by working the mines they had failed to establish damage;

That although the obligors had assigned the mining claims to a corporation they were not thereby relieved from liability, as they became sureties for performance by the corporation of the matters agreed upon;

That as it was shown that the mines were unprofitable, and that the corporation had gone into the hands of a receiver, the plaintiff had failed to show damage.

(*Per* INGRAHAM and McLAUGHLIN, JJ.): As the contract and bond contemplated the transfer of the mining property to a corporation, the conveyance by the obligors to such corporation was not such an act as made them liable for the full amount agreed to be paid from the profits or dividends, and the fact that the corporation became insolvent, and that the mines were sold by its receiver, imposed no liability upon the obligors;

That as the plaintiffs sued as assignees of the original obligee it was error to award a judgment in favor of one of the assignees who, refusing to join in the suit, was made defendant, but demanded no affirmative relief from his codefendant, and when the respective interests of the assignees were not shown. *Blewett v. Hoyt*, 227.

8. *When corporation bound by acts of president—when corporation liable on former contract after discharge of receiver—when plaintiff not entitled to interest on recovery for breach of contract.* The plaintiff had entered into a contract with the defendant corporation subletting certain work upon a building under construction for the government, for the performance of which contractors were required to give security. The contract was negotiated and signed by the president of the corporation, who owned half the stock and managed its affairs. Thereafter upon the application of other stockholders receivers of the corporation were appointed, they being empowered to complete existing contracts and to

**CONTRACT — Continued.**

continue the business. The receivers at first agreed to complete the contract with the plaintiff, but afterwards repudiated it as unprofitable, though all other existing contracts of the corporation were carried out. The president of the corporation purchased the stock of other stockholders, and, on his application showing that the company was solvent, the receivers were ordered to turn over the assets of the corporation, which was not dissolved, but the receivers were discharged with like effect as if the proceeding had not been taken.

*Held*, that the contract was made before the receivers were appointed, and that the effect of their discharge on the application of the sole stockholder without requiring an accounting was to turn over the property of the corporation subject to all liabilities whether incurred by the corporation or by the receivers, who under the circumstances must be treated as agents of the corporation, contrary to the general rule;

That as the contract had been negotiated with the president, who owned half the capital stock and had charge of the management of the business, the corporation was bound by his acts;

That as the plaintiff sent the contract in duplicate to the corporation, which was signed by its president and returned, it was immaterial that the plaintiff did not notify the defendant that he had signed it;

That although the contract required the defendant to give a bond, and the plaintiff had waived that requirement in his negotiations with the receivers, the contract was not thereby invalidated, for a failure to give a bond was a breach of contract by the defendant;

That as the contract as matter of law was made prior to the receivership, and as on the abolition of the receivership the property was restored subject to existing liabilities, an error of the court in refusing to charge that unless the contract was made before the appointment of the receivers there could be no recovery, was not prejudicial to the defendant;

That as the plaintiff brought suit before reletting the contract to another party, and did not set out that the work had been relet, or claim damage on the basis of a difference between the contract price and the cost under a new contract, he was not entitled to interest on the sum found due, for the damages were not liquidated. *Stannard v. Reid & Co.*, 304.

9. *Measure of damages to owner on breach of building contract.* Upon the breach of a building contract by the contractor when the owner finishes the work at its own expense, the measure of the owner's damage is the difference it would have had to pay the contractor under the contract if it had performed and the actual cost of completing the work, providing the same be fair and reasonable. *National Contracting Co. v. Hudson River W. P. Co.*, 665.

10. *When owner's damage not governed by contract — cost of completion by owner must be fair and reasonable.* Such rule of damage will be applied even though the contract provides that if the work be abandoned by the contractor or the contract be forfeited through unreasonable delay, etc., the owner may in its discretion contract with other parties for the completion of the work, in which case if the loss incurred by the owner is less than the sum payable under the contract if completed, the contractor shall be entitled to receive the difference, but if the expense of completion exceed the said sum the contractor shall pay the excess to the owner not to exceed the amount of the security for the performance of the contract.

Such provision of the contract does not alter the rule of damages where the owner completes the work, but merely confers upon the owner a discretionary power to employ other contractors.

In any event when the contention that the damages were measured by such provision is presented for the first time upon appeal it cannot prevail.

When the contract does not provide for the payment of a lump sum for the entire work, but compensation is to be made at unit prices for each class of construction, the owner in completing the work must show that the actual cost of specific kinds of work was fair and reasonable. *Id.*

11. *When contractor entitled to offset estimated profits on work not done by owner.* When the contract provides that the plans may be altered and the kinds and quantities of work increased or diminished by the defendant, the burden is upon the latter in establishing a counterclaim on the breach of a contract to show that portions of the work omitted by it in completing the construction were classes of work omitted by reason of a proper change of plans. When

**CONTRACT — Continued.**

there is no such testimony and the plaintiff proves the probable profit upon such items at the contract prices, such profits must be deducted from the increased cost of construction by the owner. *Id.*

12. *Trust — conveyances and contract not creating trust for benefit of third person — contract to convey lands at future date, when subject to revocation.* The owner of lands and his wife conveyed to a third person, who in turn reconveyed a life estate to the original grantor with an absolute fee to his wife if she survived her husband, and if not, then to a benevolent corporation. Upon the same day the grantor's wife entered into a contract with her husband which recited the conveyances aforesaid and whereby she agreed to leave the lands by will or deed to the corporation to take effect upon her death. The deeds were recorded, but both they and the contract were made without any knowledge or privity on the part of the corporation and without any consideration moving from it. Subsequently the original owner and his wife abrogated the agreement, and entered into a new contract to transfer the property to their son.

On the issue as to whether said instruments were effective to vest a title in the corporation,

*Held*, that the corporation not being a party to the contract between the owner and his wife and parting with no consideration, was not entitled to enforce it;

That the corporation's interest under the deeds was contingent upon the wife dying before her husband and that as she survived him, she took the fee;

That no irrevocable trust was created for the benefit of the corporation which required the wife to convey, and that the contract being wholly executory during the lifetime of the husband and being based upon no consideration furnished by the corporation, could be rescinded so as to revoke the trust, if any. *Webb's Academy & Home for Shipbuilders v. Hidden*, 711.

13. *Evidence insufficient to show contract.* Evidence as to whether a contract was made with the defendants or with a third person individually considered and

*Held*, that it was insufficient to sustain a finding that the contract was made with the defendants. *Burr v. Schefer*, 834.

14. *When error to exclude evidence that person negotiating contract was not agent of defendants.* When in an action for the breach of a contract the defendants contend that the contract was made with a third person who was not acting as their agent but the court charges that the plaintiff may recover either if the contract were made with the defendants or with the third person acting for them, it is error to exclude an agreement fixing the business relations between the defendants and the third person. Such error is not cured by charging in substance that the plaintiff cannot recover if the jury find that no agreement was entered into but that the jury may consider both the defendants' testimony denying the contract was made with them and the testimony as to the agency of the third person. *Id.*

15. *Same — new trial granted for failure to instruct as to measure of damage.* When in an action on the breach of a contract the court fails to give any instructions as to the rule of damages and there is no evidence specifically indicating the amount of damage, the verdict will not be affirmed but a new trial should be granted. *Id.*

16. *Principal and agent — contract to procure legislation — when plaintiff not procuring cause of appropriation.* In an action to recover commissions upon moneys paid by the Federal government for the infringement of patents, it appeared that the plaintiff sought to recover upon a verbal contract made in 1879 to procure legislation appropriating money for the infringement; that thereafter, in 1881, a written contract to the same effect was made by the defendant limiting plaintiff's services to a particular session of Congress; that the actual appropriation made in 1902 was due to the solicitation of a person with whom the plaintiff was unconnected.

Upon the whole evidence,

*Held*, that the plaintiff was not the procuring cause of the appropriation and his complaint should have been dismissed. *Swift v. United States Regulation Fire Arms Co.*, 855.

17. *Attorney and client — agreement to collect gambling debts for contingent fee.* An agreement by an attorney to collect for a contingent fee all claims which may be defended upon the ground that they were gambling debts is contrary

**CONTRACT — Continued.**

to public policy and void. The court will not aid in its enforcement. *Delahanty v. Canfield*, 888.

18. *Same*. (Per LAUGHLIN, J., and PATTERSON, P. J.): A verdict for an attorney founded upon said contract made ten years before the services were rendered is not warranted by the evidence when the attorney fails to deny testimony that a settlement for claims collected was made upon a different basis. *Id.*

Action upon merchant's account — evidence showing debt.

*Barron v. Lance*, 914.

Waiver of conditions of contract in consideration of agreement to arbitrate.

*See* ARBITRATION.

Consideration for contract of retainer.

*See* ATTORNEY AND CLIENT, 1.

Attorney who repudiates contract for contingent fee cannot recover upon *quantum meruit*.

*See* ATTORNEY AND CLIENT, 9.

Relation between bank and depositor.

*See* BANKING, 1.

Power of president of railroad to make contract when employment of consulting engineer has been authorized by the directors — director and secretary may receive such appointment.

*See* CORPORATION, 1-8.

Acceptance of bonds and stocks as payment for construction of a railroad is not a stock subscription and contractor is not liable to receiver for par value.

*See* CORPORATION, 6-8.

Measure of damages upon failure to furnish machinery adapted for specific use.

*See* DAMAGES, 2-4.

When fact that vessel was insured can be shown in action to recover for services in saving it.

*See* EVIDENCE, 1.

Admission of parol evidence showing that written contract of sale was conditional.

*See* EVIDENCE, 2.

Ambiguous clauses in contract of guaranty will be construed against guarantor.

*See* GUARANTY, 1.

Guarantee cannot recover against guarantor of assigned claim until he has exhausted his remedy thereon.

*See* GUARANTY, 2.

Exemption clause in fire insurance policy construed strictly against insurer.

*See* INSURANCE, 8.

Construction of insurance policies.

*See* INSURANCE, generally.

*Ultra vires* award of contract for improvement of hospitals in New York city — bid in excess of appropriation.

*See* MUNICIPAL CORPORATION, 4.

When partition agreement resting in parol enforced in equity.

*See* PARTITION.

Facts constituting conversion — counterclaim on contract deaaurable.

*See* PLEADING, 11.

Right of principal to revoke agency.

*See* PRINCIPAL AND AGENT, 1.

When contract to secure concessions from foreign government not immoral.

*See* PRINCIPAL AND AGENT, 4.

Actions upon contracts of agency.

*See* PRINCIPAL AND AGENT, generally.

For the sale of real estate.

*See* REAL PROPERTY.

**CONTRACT — Continued.**

Right of vendor of hops after tender of delivery to store hops with warehouseman and sue for purchase price.

See SALE, 8.

For the sale of personal property.

See SALE, generally.

Stipulation settling controversies as to executor's accounts.

See STIPULATION.

**CONTRIBUTORY NEGLIGENCE.**

See NEGLIGENCE, generally.

**CONVERSION.**

1. *Use of corporate check by officer for individual debt.* Although the president of a corporation has used the check of the corporation to pay a personal debt due the defendant, the corporation is not entitled to recover the money represented by the check when it has waived the tort of its president, has treated the debt as a claim against him, and has accepted in payment thereof the obligations of a third party adequately secured. *Security Warehousing Co. v. Am. Exchange Nat. Bank*, 350.

2. *Same — novation — acceptance of obligation of third person in settlement of claim.* When a corporation accepts the obligation of a third party in settlement of the claim against its president for the unauthorized use of a corporate check, there is a novation and it can thereafter look only to the substituted debtor for reimbursement.

A party can have but one satisfaction for a wrongful act; full satisfaction by one joint tort feisor discharges the others. *Id.*

3. *Same — satisfaction by one joint tort feisor discharges others.* Hence, a corporation by accepting the obligations of a third party in settlement of its claims for the tort of its president in misapplying the corporate check has had satisfaction from one joint tort feisor and cannot recover against the other who received the check, whether the latter were a *bona fide* holder or no. *Id.*

4. *Sale by sheriff on execution — when question as to whether plaintiff was estopped from asserting title should be left to a jury.* When a sheriff attaches property supposed to belong to a married woman and immediately after the levy serves the attachment upon her in the presence of her husband who states that he does not own the property, and thereafter an inventory is made certified by two disinterested freeholders, and, after judgment is entered in the action, the sheriff levies execution on the said property, advertises it for sale, and at the sale the husband for the first time claims ownership and thereafter sues the sheriff for conversion, the question as to whether the sheriff relied upon the statement of the husband and whether the latter was estopped from asserting title should be left to a jury. *Feinberg v. Allen*, 497.

5. *Same — pleading.* It is not necessary to plead facts relied upon to create an estoppel, and where facts have been received in evidence without objection tending to show that the plaintiff in good conscience did not own the property as against the defendant sheriff, the evidence may be considered by the jury. *Id.*

Facts constituting conversion — counterclaim on contract demurrable.

See PLEADING, 11.

Action against president of corporation to recover moneys expended for illegal purposes and upon improvident contracts.

See PLEADING, 12, 15.

Complaint against officer of insurance corporation made more definite and certain.

See PLEADING, 18.

Unauthorized sale of stock by broker.

See PRINCIPAL AND AGENT, 7.

*Bona fide* purchaser of real property not liable for conversion of fixtures on which no lien was filed.

See SALE, 2.

See BAILMENT.

**CORPORATION.**

1. *Contract—action by consulting engineer for services to railroad—power of president of railroad to direct performance of services.* When a consulting engineer has been appointed by resolution of the directors of a railroad "at such compensation as the board may hereafter determine upon," the president of the corporation may authorize the actual performance of the services, when the by-laws provide that he shall be the chief executive officer of the company and shall supervise other officers and all departments of the road in every respect. *Bogart v. New York & Long Island Railroad Co.*, 50.

2. *Same—when such employment not inconsistent with office of director and secretary.* In order to warrant a recovery for such services it is only essential that they were within the line of services performed by consulting engineers and were directed to be performed by the president in good faith.

This is true although the engineer had previously been elected a director and secretary of the railroad, as by virtue of such office he was under no obligation to perform services as consulting engineer.

The railroad by paying a prior bill for similar services admitted its obligation to pay for like services thereafter rendered by authority. *Id.*

3. *Same—affidavit as evidence.* The affidavit of the president of the railroad used in a motion for a bill of particulars which admitted that the services were rendered "for the defendant" is competent evidence against it. *Id.*

4. *Action to dissolve corporation under section 1785 of the Code of Civil Procedure—When Attorney-General acts in good faith.* When an action to dissolve a corporation is brought by the Attorney-General under section 1785 of the Code of Civil Procedure upon the ground that the defendant has remained insolvent and has failed to discharge its notes for one year, after a hearing upon notice to the defendant in which the insolvency and the failure to pay the notes were admitted, the action is justified, and it cannot be said that it was not brought in the discharge of a public duty and in good faith. *People v. Troy Chemical Co.*, 437.

5. *Same—dissolution decreed when statutory facts admitted.* Where the answer admits that the defendant suspended its ordinary and lawful business for more than a year owing to bankruptcy proceedings brought against it, a dissolution of the corporation under the statute is proper.

So, too, a dissolution is proper when the corporate notes have not been paid for more than one year although the corporation has been discharged in bankruptcy, the discharge not operating as payment or protecting the corporation from an action to dissolve it.

Whether or no the court may exercise its discretion in an action for the dissolution of a corporation, when the plaintiff has shown the statutory requisites for a dissolution, a decree thereof should be granted. *Id.*

6. *Contract to pay for railroad construction in bonds and stocks—such contract not stock subscription.* A contract by a railroad to pay a contractor in bonds and full-paid non-assessable stock of the corporation for his work, labor and materials in constructing and equipping the road is not a stock subscription by the contractor, which makes him liable for the par value of the stock. Such contract is not a purchase of the stock and bonds to be paid for in work and property, but is a contract to accept full-paid stock and bonds as payment for the building of the road. *Bostwick v. Young*, 490.

7. *Same—pleading—when complaint of receiver insufficient.* The receiver appointed on the insolvency of such railroad is not entitled to recover from contractor the alleged value of the stocks and bonds received as compensation for the construction of the road, when it is not alleged that the cost of constructing the road and the value of the properties acquired from the contractor were of less value than the par value of the stock and bond delivered in payment. *Id.*

8. *Same—when receiver estopped by action of corporation.* In any event, although the payment of the contractor in bonds and stocks were fraudulent, the receiver not being vested with rights personal to the creditors and merely standing in the place of the corporation, can maintain no action against the contractor to recover the alleged value of the stock and bonds, being, like the corporation, bound by an equitable estoppel. *Id.*

Action by receiver to set aside assignment of trade marks as in fraud of creditors.

*See ASSIGNMENT, 1-3.*



**CORPORATION** — *Continued.*

Preference by insolvent corporation contrary to section 48 of the Stock Corporation Law.

*See* BANKRUPTCY, 1-6.

When bound by acts of president in negotiating contract — when liable on contract repudiated by receivers.

*See* CONTRACT, 8.

Acceptance by corporation of obligation of third person in settlement of claim against its president bars action against him for conversion.

*See* CONVERSION, 1-3.

Estoppel from pleading misnomer after answer.

*See* DEBTOR AND CREDITOR, 1, 2.

Transfers of corporate property constituting fraud of creditors.

*See* DEBTOR AND CREDITOR, 4.

Suit in equity by creditor against stockholders for unpaid subscriptions — failure to sue within two years excused — defaulting subscribers not necessary parties.

*See* DEBTOR AND CREDITOR, 6-12.

Stockholder's action to impress a trust upon property held by another corporation — examination before trial.

*See* DEPOSITION, 6.

Power of court to set aside election of directors of insurance corporation — by-laws fixing number of directors — rights of policyholders — former directors hold over when election set aside.

*See* INSURANCE, 2-6.

Forfeiture of fire insurance policy by assignment of corporate assets.

*See* INSURANCE, 10.

When amendment to correct name of defendant corporation allowed — costs.

*See* PLEADING, 2.

Action against directors for accounting.

*See* PLEADING, 6-8.

Action against president of corporation to recover moneys expended for illegal purposes and upon improvident contracts — validity of election of *de facto* officer immaterial.

*See* PLEADING, 12-15.

Action for general accounting against president of insurance corporation.

*See* PLEADING, 16.

Complaint against president of corporation to recover moneys obtained pursuant to conspiracy.

*See* PLEADING, 17.

Complaint against officer of insurance corporation for conversion.

*See* PLEADING, 18.

Complaint against officer of insurance corporation for damages for negligence.

*See* PLEADING, 20.

Trustee cannot attack the existence of *cestui que trust* corporation in action to settle accounts — when benevolent corporation entitled to take.

*See* WILL, 12, 13.

Trust for foreign charitable use — when foreign unincorporated college cannot take.

*See* WILL, 14.

Trust for educational institutions, etc. — power of Supreme Court to supervise gift to charitable use.

*See* WILL, 15-17.

*See* BUILDING LOAN ASSOCIATION.

**COSTS.**

*When separate bills allowable.* In an action at law defendants who separately appear and answer may tax separate bills of costs unless it be shown that they are united in interest or collusively appear by separate attorneys in bad faith for the purpose of enhancing the costs.

**COSTS** — *Continued.*

Extra allowance affirmed. *Rowe v. Granger*, 459.

Extra allowance in judgment creditor's action discretionary.

*See* DEBTOR AND CREDITOR, 17.

Upon amendment to correct name of defendant corporation.

*See* PLEADING, 2.

Upon consolidation of actions in Supreme Court and City Court.

*See* PRACTICE, 8.

**COUNTERCLAIM.**

*See* SET-OFF, generally.

**COURT.**

*Municipal Court of Buffalo* — *power of justice to grant adjournment.* The provisions of the Code of Civil Procedure relating to adjournment of cases in Justices' Courts apply to the Municipal Court of the city of Buffalo.

While a case may not be adjourned in a Justice's Court or in the Municipal Court of Buffalo against objection after the trial has been commenced, an adjournment granted in order to allow the correction of a commission issued to take testimony of foreign witnesses is proper when no evidence had been taken, but merely some preliminary objections and rulings had been made. *Winqvist v. Preston*, 564.

Decision of General Term *res adjudicata* upon subsequent appeal to Appellate Division.

*See* APPEAL, 2.

Liquidating agent of national bank may be sued in State court for accounting.

*See* BANKING, 8.

Jurisdiction of State court in action to set aside unlawful transfer by bankrupt.

*See* BANKRUPTCY, 9.

State court may determine validity of contract to procure legislation.

*See* CONTRACT, 4.

Power of court to require testamentary trustees to exhibit records of their acts in foreign jurisdiction.

*See* DISCOVERY, 1.

Concurrent jurisdiction of surrogate and Supreme Court on accounting by executor.

*See* EXECUTOR AND ADMINISTRATOR, 2-6.

Equity cannot order issuance of liquor tax certificates after improper submission of local option.

*See* INTOXICATING LIQUOR, 2.

When return of justice of the peace amended.

*See* JUSTICE'S COURT.

Power to permit amendment of complaint to bring in additional defendants.

*See* PARTY.

Power of Appellate Division upon review of decision of Railroad Commissioners.

*See* RAILROAD, 4.

Foreign trustee subject to suit in State court.

*See* WILL, 1.

Power of Supreme Court to supervise gift to charitable use.

*See* WILL, 17.

*See* SURROGATE.

**COVENANT.**

Breach of covenant for quiet enjoyment by refusal of possession.

*See* LANDLORD AND TENANT.

When restrictive covenant against offensive trades fails through altered character of neighborhood.

*See* REAL PROPERTY, 1.

**CRIME.**

1. *Forgery in third degree — proof necessary to conviction.* On the trial of an indictment for forgery in the third degree under section 515 of the Penal Code for willfully omitting to make true entries in account books with the intent to conceal a larceny, it is not necessary that the prosecution show that the defendant himself committed the larceny concealed by the false entry. Evidence considered and judgment of conviction affirmed. *People v. Curtiss*, 259.

2. *Trial — adjournment refused.* The granting of an adjournment of a trial in a criminal action is in the sound discretion of the judge which will not be interfered with unless injustice has been done. It is not reversible error to refuse to grant an adjournment by reason of the absence of one of the defendant's counsel when in fact a carefully prepared defense was made at trial. *Id.*

3. *Same — charge.* It is not error to refuse to charge that the fact that the defendant did not flee from the scene of his crime may be considered by the jury. Such evidence is a self-serving declaration, not connected with the *res gestæ*. *Id.*

4. *Habeas corpus — when warrant of commitment sufficient.* The warrant of commitment of one convicted of crime, except in capital cases, need not be signed by the judge or justice who pronounced judgment or by a clerk of the court. Under section 486 of the Code of Criminal Procedure a certified copy of the judgment as entered on the minutes is sufficient warrant for the execution of judgment. *People ex rel. Dauchy v. Pitts*, 457.

5. *Manslaughter in the first degree.* On the trial of an indictment for manslaughter, the defendant may show that he had the reputation of having a quiet, peaceable disposition, and it is not necessary to show his general reputation. *People v. Van Gaasbeek*, 511.

6. *Same — evidence — erroneous exclusion of testimony as to defendant's good character.* One accused of crime may show that his reputation among people who know him best is such as rendered it improbable that he would be guilty of the particular crime charged.

As evidence of good character, standing alone, may create a reasonable doubt of guilt, the exclusion of such evidence is reversible error. *Id.*

7. *Burglary, third degree — evidence — errors in admission of evidence.* On the trial of an indictment of burglary, third degree, it is error to allow a witness who aided in the burglary to testify that he and the defendant committed other burglaries wholly disconnected with the crime in question.

Evidence of conversations between the defendant and the witness relating to other unconnected burglaries is not admissible to show an unlawful purpose. *People v. Dixon*, 593.

8. *Trial — comment by court.* When the district attorney has stated before the jury that the defendant's attorney had made improper remarks and that the law which throws a mantle of protection around the defendant sometimes works injustice, it is prejudicial to the defendant for the court to emphasize the district attorney's remarks by stating that the defendant's counsel, if dissatisfied, has an objection and exception thereto.

So, too, it is prejudicial for the court, when the jury has been out all night without being able to agree, to state that if agreements cannot be had in that county it does very much to cause unrest in the administration of the law. *Id.*

9. *Grand larceny, second degree — evidence — erroneous admission of false money found in possession of defendants.* On the trial of an indictment for grand larceny in the second degree in stealing the plaintiff's money during a game of dice, it is error to admit in evidence "phony rolls" (rolls of paper surrounded by a genuine bill to simulate a roll of money) found in the defendants' possession three months after the alleged larceny. *People v. Smilie*, 611.

10. *Same — objection, when sufficient.* An objection to evidence connecting the "phony rolls" with the defendants sufficiently apprises the trial court that the objection will be taken to the rolls and it cannot subsequently be maintained that no objection was taken.

Cross-examination by district attorney criticised. *Id.*

11. *Forgery in the second degree — indorsement of check — judgment of conviction affirmed.* A defendant who knowing that the indorsement of the payee of a check has been forged, deposits the same in his private bank account for collection,

**CRIME** — *Continued.*

is guilty of forgery in the second degree under the provisions of sections 520, 521 and 511 of the Penal Code.

A defendant who knows that the check was obtained from the drawer in payment of a debt due the payee and that the indorsement of the latter is forged, and who collects the money thereon is guilty of an intent to defraud even though he intends to apply the proceeds upon an alleged claim against the payee. *People v. Mingey*, 652.

12. *Robbery, first degree.* Evidence given on the trial of an indictment for robbery in the first degree considered and judgment of conviction affirmed. *People v. McKenna*, 766.

13. *Forgery in first degree in executing and uttering false deeds.* On the trial of an indictment for forgery in the first degree in forging and uttering deeds of real property, the evidence considered and judgment of conviction affirmed. *People v. Browne*, 793.

14. *Same — evidence — person whose name is forged need not be produced as witness.* On the trial of an indictment for forgery it is not necessary that the person whose name is alleged to have been forged be produced as a witness and testify that he did not sign the paper or authorize the signature. These facts may be proved by other evidence. *Id.*

15. *Trial — adjournment.* Criminal trials cannot be indefinitely postponed because the defendant asserts that he has a material witness who cannot then be produced. To obtain an adjournment it is necessary to show that the applicant has not been guilty of neglect and that it is probable that the attendance of the witness can be had at the time to which the trial is proposed to be deferred. *Id.*

16. *Forgery — prior conveyances to fictitious grantees.* On the trial of an indictment for forging a deed, evidence of various conveyances of the property with which the defendant has been connected and the possible fictitious character of the grantees is competent as tending to show that the defendant was engaged in a scheme to defraud, which finally culminated in the forged conveyance.

So, too, transactions had with a person to whom the forged deed was given prior to and leading up to the final transaction were admissible.

Charge considered and approved. *Id.*

17. *Maintaining public nuisance — house for abortion.* It is a nuisance for a person by public advertisement to invite and receive persons in a house for the purpose of abortion and a conviction may be had under sections 385 and 387 of the Penal Code, although the crime of abortion is governed by section 294 of that Code.

Maintaining such an institution is an offense against public decency, apart from the crime of abortion. *People v. Hoffman*, 862.

Verdict for personal injuries cannot be based upon plaintiff's earnings in criminal employment.

*See DAMAGES*, 1.

[For table containing all sections of the Code of Criminal Procedure cited and construed in this volume see *ante*, p. xlv.]

**DAMAGES.**

1. *Negligence — verdict cannot be based on plaintiff's earnings in criminal employment.* What a person earns by crime cannot be made a basis of damage for personal injuries occasioned by negligence.

Thus, in action for damages for personal injuries, it is error to refuse to instruct the jury that it cannot consider the plaintiff's earnings in placing bets for a bookmaker as a basis for damage, that occupation being unlawful. *Murray v. Interurban Street Railway Co.*, 35.

2. *Sale — machinery not adapted for specified use — interest on unliquidated claim.* In an action for damages based on the failure of the defendant to furnish machinery adapted to manufacture successfully glazed cotton wadding, an allowance of interest upon the amount of damages is not authorized for the claim is not liquidated.

The value of labor furnished by the plaintiff without the request or consent of the defendant in installing the defective machinery is not recoverable as an item of damage. *Munson v. Smith Woolen Machinery Co.*, 398.

**DAMAGES — Continued.**

3. *Same — measure of damages of vendee.* When in order to effect the installment of the machinery the plaintiff handed his mill over to the defendant and lost the use thereof, the plaintiff may recover the loss of rental value when the machinery turns out to be defective for the purpose contemplated.

Although the contract relieved the defendant from damages for any delay caused by strikes, it is not entitled to the benefit of such clause when the machinery installed was not adapted for the use contemplated.

Moreover, such defendant failing to furnish proper machinery cannot have advantage of delay caused by changes in the plan made by the request of the plaintiff.

Although the installment of the machinery required only the reconstruction of part of the machinery of the mill, the plaintiff may recover the rental value of the entire mill if it were made useless during the period of construction, so that no other business could be carried on. *Id.*

4. *Same — evidence — rental value of mill property.* However, the proof of the rental value of the mill cannot be given by a witness whose information as to the horse power used was based wholly upon hearsay and who was not acquainted with the manufacture of glazed cotton wadding contemplated, and who actually bases his valuation upon the profit to be made.

Rental value, when taken as the measure of damages, excludes consideration of the cost of maintenance and a fair return for the money invested because of uncertainty. *Id.*

Interest on recovery for breach of contract.

*See* CONTRACT, 8.

Upon completion of building contract by owner — estimated profits offset.

*See* CONTRACT, 9-11.

New trial granted for failure of court to instruct as to measure of damages.

*See* CONTRACT, 15.

In condemnation proceedings.

*See* EMINENT DOMAIN, generally.

Erroneous assessment of damages based upon affidavit of plaintiff.

*See* EVIDENCE, 5.

Restricted to allegation of injury — loss of wife's services.

*See* NEGLIGENCE, 2.

Injury to horse and wagon by collision with automobile.

*See* NEGLIGENCE, 13.

Failure to show whether injuries resulted from accident or surgical operation.

*See* NEGLIGENCE, 24.

Upon unauthorized sale of stock by broker.

*See* PRINCIPAL AND AGENT, 8.

For ejectment from street car after refusal to accept transfer.

*See* RAILROAD, 1.

Upon breach of contract to deliver lumber — erroneous proof.

*See* SALE, 3.

**DEBTOR AND CREDITOR.**

1. *Creditor's action to establish lien on property assigned by debtor — when plaintiff has exhausted legal remedy.* When a corporation doing business under a name not its own has answered under that name in an action against it without pleading a misnomer, it cannot in a subsequent judgment creditor's action against its assignee contend that the plaintiff had not exhausted his legal remedy, or that the execution returned unsatisfied was not an execution against the corporation. *McNeal v. Hayes Machine Co., Incorporated*, 130.

2. *Estoppel — failure of corporation to plead misnomer in abatement.* When a defendant answers without pleading such misnomer or questioning the correctness of its corporate name, it is estopped from thereafter denying that it was sued by its correct name.

When a party is known by different names he may be sued under either without an alias, which rule applies to corporations as well as individuals. *Id.*

**DEBTOR AND CREDITOR — Continued.**

3. *Party.* When a judgment creditor's action is not brought to set aside a transfer of property by a debtor but merely to assert a lien upon property transferred through two successive assignees, the first assignee is not a necessary party. *Id.*

4. *Facts showing fraud.* Evidence showing successive transfers of corporate property to an individual and another corporation managed by the same officers considered, and

*Held*, that the transactions constituted a constructive fraud against creditors and that the property was subject to an equitable lien. *Id.*

5. *Judgment creditor's action to reach trust fund — when complaint states cause of action.* In a judgment creditor's action against trustees holding property for the debtor it was alleged that under the will the trustees were empowered in their discretion to pay the debtor such sum as was necessary for his support; that the sum allowed by the trustees was excessive, and that the balance of the debtor's income was applicable to the judgment; that there had already accrued from such surplus income a large amount of money remaining in the trustees' hands not paid to the debtor, and that the trustees have received and now retain moneys in trust for the use of the debtor applicable to the payment of his debts.

*Held*, that the complaint stated a good cause of action;

That as the answer did not allege that the whole of the amount set apart for the support of the debtor had been paid, and that no part of it remained in the possession of the trustees, it was subject to demurrer. *Herts Brothers v. Tiffany*, 215.

6. *Suit in equity by creditor against stockholders for unpaid subscriptions — defaulting subscribers not necessary parties.* In a creditor's action against stockholders of an insolvent corporation to recover sums unpaid upon their stock subscriptions, subscribers who never paid the ten per cent essential to make them stockholders are not necessary parties.

Neither is it necessary to join subscribers whose subscriptions have been declared forfeited by resolution of the board of directors. *Ford v. Chase*, 605.

7. *Pleading.* A complaint excusing the joinder of parties whose subscriptions are forfeited need not allege the details essential to the declaration of forfeiture by the directors pursuant to section 43 of the Stock Corporation Law, such facts being merely evidential. *Id.*

8. *Same — sufficient allegation of promise to pay for stock.* When the creditor alleges that the entire capital stock was subscribed and that the several defendants named subscribed for and agreed to take shares of capital stock as specifically set forth and that certain specified sums on the subscription are due and unpaid by each defendant respectively, there is a sufficient allegation of an agreement to pay, and the complaint is not open to the objection that part of the stock may have been paid for in property or labor. *Id.*

9. *Novation.* When a corporation assumes the contract of a vendee of lands and agrees to pay the consideration to the vendor, it assumes the debt and becomes the debtor of the vendor within the purview of section 54 of the Stock Corporation Law. *Id.*

10. *When debt of corporation payable within two years.* Although by section 55 of the Stock Corporation Law a stockholder is not personally liable for debts of a corporation not payable within two years from the time contracted, nor unless an action for collection shall be brought within two years after the debt becomes due, yet when in 1903 a corporation assumed the obligations of a vendee under a contract to sell lands made in 1902, the consideration to be paid in 1904, the liability of the corporation for the debt matures within the statutory period, for the agreement assuming the debt is an independent agreement creating a new obligation. The purpose of the statute is to prevent the extension of credit to a corporation for a longer period than two years and should not be so construed as to include the time a debt was running preceding the date when the corporation assumed it. *Id.*

11. *Failure to bring suit excused by injunction.* A failure to bring suit against stockholders within two years as required by said section 55 is excused when all actions were enjoined on the appointment of a receiver. *Id.*

**DEBTOR AND CREDITOR** — *Continued.*

12. *When legal action not prerequisite to suit in equity.* When a complaint in a creditor's action alleges the insolvency of the corporation, its dissolution, the conversion of its assets into money and the inadequacy of the same to pay the debts, it is not necessary for the creditor to exhaust his legal remedy against the corporation. *Id.*

13. *Judgment creditor's action in affirmance of deed of trust for benefit of creditors — evidence — judgment roll admissible against trustee to establish debt.* In an action by a judgment creditor against trustees holding property under a deed of trust made by the debtor to pay creditors, the judgment roll in the action by the creditor against the debtor is admissible as proof of the indebtedness to the plaintiff if the claim accrued prior to the execution of the deed. *Nicholas v. Lord*, 800.

14. *Same — party.* The validity of a claim existing at the time of the execution of the trust deed may be established by an action subsequently brought without making the trustee a party defendant. The trustee is a proper but not necessary party to such action, and, even though not a party, the judgment is binding upon him in the absence of fraud or collusion. *Id.*

15. *Same — judgment roll.* Such judgment roll is *res adjudicata* as to any material findings of fact therein which facts may be used as evidence between the parties and their privies, although the creditor suing the debtor's trustee as aforesaid may not be entitled to recover the total amount of the judgment. *Id.*

16. *Same — release of alleged claims by debtor admissible to disprove offset.* The judgment creditor had formerly been in partnership with the judgment debtor, and had obtained his judgment in an action for a partnership accounting. The debtor had brought a subsequent action to assert his claim to certain lands used in the partnership business, which action was discontinued, he executing a release of all claims upon the lands.

*Held*, that the release, although executed subsequent to the debtor's deed of trust for the benefit of creditors, was admissible in the judgment creditor's action against the trustee to show both that the creditor's former action was not compromised in the settlement of the action by the debtor, and also that any claim that the debtor had against the creditor on account of said lands was adjusted and satisfied;

That such release was not objectionable evidence on the theory that it was an admission or declaration of the grantor after the execution of the trust deed.

*Held, further*, that the debtor's cause of action, if any, against the creditor, not being assigned to the former's trustee, the debtor alone had a right to offset the same against the creditor. *Id.*

17. *Same — extra allowance.* In such creditor's action the court in its discretion may grant an extra allowance. *Id.*

18. *Same — parties — when other creditors necessary parties.* Where a judgment creditor's action is brought in his own behalf and in behalf of other creditors, if any, in affirmance of a deed of trust and to recover thereunder his *pro rata* share of the trust property, a judgment for the plaintiff alone is not warranted when there is no proof as to the non-existence of other claims upon the fund. There should be a reference and notice given affording other creditors an opportunity to become parties. *Id.*

Action by receiver to set aside assignment of trade marks as in fraud of creditors.

*See* ASSIGNMENT, 1-3.

Relation between bank and depositor.

*See* BANKING, 1.

Secured creditor entitled to preference to amount of security released.

*See* BANKRUPTCY, 2.

**DEED.**

When deed executed by spendthrift creating trust for his own benefit not procured by fraud.

*See* TRUST, 1-3.

*See* REAL PROPERTY, generally.

**DEFINITION.**

When "celebrating" has libelous meaning.  
*See* LIBEL, 2.

**DEMURRER.**

Appeal from judgment on demurrer brings up the propriety of order on which it is founded.

*See* APPEAL, 1.

Review of decision holding complaint insufficient when issue was raised by demurrer to the answer — truth of allegations of answer not considered.

*See* ATTORNEY AND CLIENT, 4.

*See* PLEADING, generally.

**DEPOSITION.**

1. *Practice—examination before trial to prove partnership of defendants.* When the complaint alleges and the answer denies that the defendants were doing business as copartners and the plaintiff shows that the defendants have filed a certificate in the county clerk's office stating that they intended to do business under the firm name alleged, the plaintiff is entitled to examine the defendants before trial to prove that fact.

That the plaintiff's allegation as to the partnership of the defendants was not upon information and belief or that he had personal knowledge of the fact does not justify the court in refusing an examination before trial.

The Appellate Division is committed to a construction of sections 870 and 872 of the Code of Civil Procedure which will permit a party to an action to take the deposition of an adverse party where it is apparent that his evidence will be material at the trial of the action. *Istok v. Senderling*, 162.

2. *When examination upon interrogatories matter of right.* In the absence of bad faith the provision of section 889 of the Code of Civil Procedure requiring the issuance of a commission upon interrogatories is mandatory. All that is necessary to show upon a motion for such commission is that the action is one mentioned under section 888 of the Code of Civil Procedure and that the testimony of one or more witnesses not within the State is material to the applicant. *Oakes v. Riter*, 772.

3. *Same—party.* The commission may in a proper case issue to examine a party as well as a witness. *Id.*

4. *Examination of party before trial.* Although under the present rule in the first department a party, in the absence of bad faith or abuse of process, is entitled to examine his adversary before trial as to facts which are material to the issue of which he has knowledge and to take his deposition for use on the trial, yet on the application it must be shown that material issues are involved of which the party sought to be examined has knowledge, and this must be established not by mere assertion of the affiant's conclusions but by allegations of facts from which the justice to whom the application is made can himself draw the necessary conclusions. *Grant v. Greene*, 850.

5. *Same—reference to unverified complaint.* The affidavit in order to establish the nature of the action and the claims which the plaintiff asserts may make reference to an unverified complaint which is attached to and made part thereof. *Id.*

6. *Same—stockholder's action to impress a trust.* In a stockholder's action to obtain a decree adjudging that another corporation holds legal title to property in trust for the stockholder's company and for an accounting, an examination before trial of the officer of the alleged trustee may be had when the complaint shows that the plaintiff may not be able to secure his attendance at trial; that he is the only living person having full knowledge of the facts necessary to prove the plaintiff's case; that although he has been examined in other actions and has made admissions which go to prove the allegations of the complaint, such admissions cannot be used against the other defendants, and that he has knowledge of the specific facts and circumstances as to which the examination is sought, etc., and that the plaintiffs intend to call him on trial as their principal witness. *Id.*

7. *When moving affidavit sufficient.* The affidavit on an application for examination of a party before trial need only allege the necessary facts; it need not state the evidence tending to prove those facts. *Id.*



**DEPOSITION — Continued.**

8. *Examination of party before trial cannot be used to obtain due service on codefendant.* A plaintiff is not entitled to the examination of the officers of a defendant corporation before trial for the mere purpose of finding out upon whom the summons can be served to obtain jurisdiction of another defendant corporation. *Grant v. Greene Consolidated Copper Co.*, 853.

9. *Practice — nature of ex parte motion not changed by informal appearance of respondent.* When on an *ex parte* application to vacate an order for the examination of a defendant before trial, the court requires the defendant to give informal notice to the plaintiff, the motion is not turned into one made upon notice so that the refusal of the justice to vacate the order *ex parte* is a bar to a subsequent motion upon formal notice. *Id.*

When affidavit of president may be used as evidence against a corporation.

*See* CORPORATION, 8.

Erroneous assessment of damages based upon affidavit of plaintiff.

*See* EVIDENCE, 5.

**DISCOVERY.**

1. *Of books and papers — when court has jurisdiction to require testamentary trustees to exhibit their accounts.* When trustees and executors holding property in this State and in foreign jurisdictions bring an action in the courts of this State asking a construction of the will and a compromise agreement made by the devisees, and pray for leave to sell real estate upon the ground that the sale is necessary for a proper distribution under the will, the court has jurisdiction to compel them to allow a discovery and inspection of the records of the estate on a motion of interested parties, in order that the exact situation may be made clear.

The inspection may include an inspection of the books and papers in foreign countries pertaining to the estate. *Muller v. City of Philadelphia*, 276.

2. *Inspection of books and papers — when former order of inspection not a bar to subsequent application.* When on a motion to obtain an inspection of an affidavit it appeared that two affidavits have been made in different cities and contain different allegations, the granting of a motion for the inspection of one affidavit is not *res adjudicata* requiring that an inspection of the other affidavit should be denied. *Memphis Trotting Association v. Smathers*, 862.

**DOMESTIC RELATIONS.**

*See* HUSBAND AND WIFE.

*See* PARENT AND CHILD.

**DOWER.**

Deed of widow as sole devisee conveys only her dower right when child was born after making of will.

*See* PAYMENT.

**DURESS.**

Counterclaim alleging duress by pursuance of a legal remedy is demurrable.

*See* SALE, 7.

Burden of proof to establish will where testator's physician is sole beneficiary.

*See* WILL, 8.

**EASEMENT.**

When maintenance of railroad viaduct does not reduce rental value.

*See* EMINENT DOMAIN, 3.

Measure of damages to easements by enlargement of viaduct.

*See* EMINENT DOMAIN, 5.

Grantee takes subject to easement in light and air created by deed.

*See* REAL PROPERTY, 11.

When abutting owners entitled to damage for easements over street although fee in another.

*See* TAX, 4.

**ELECTION.**

Power of court to set aside election of directors of insurance corporation — former directors hold over when election set aside — when notice insufficient.

See INSURANCE, 2-6.

**ELECTION LAW.**

*Mandamus directing recount of votes — petition must state particular districts in which ballots were improperly counted.* In a petition for mandamus under section 114 of the Election Law to obtain a recount of ballots which were counted although marked for identification and other ballots which were rejected as void, the petitioner must state the particular election districts in which the facts stated appeared upon the certified return. A general allegation that in the certified original returns of the canvass of the vote in all the election districts of the city, such ballots appeared is not such compliance with the statute as justifies the issuance of a mandamus to include all the election districts of the city. *Matter of Orduway*, 386.

**ELECTION OF REMEDIES.**

By legatees in suing transferee of a joint legatee for an accounting.

See EXECUTOR AND ADMINISTRATOR, 13.

Remedies of lienor where bond has been given to discharge mechanic's lien.

See LIEN, 3.

Filing of mechanic's lien inconsistent with claim of title.

See SALE, 2.

**EMINENT DOMAIN.**

1. *Taking property for opening of Morris avenue, city of New York — award chargeable with deficiency judgment on foreclosure.* Upon the foreclosure of a mortgage upon lands which have been taken for a city street, the lien of the mortgage covers so much of any damage awarded in the condemnation proceedings as is necessary to make good the deficiency.

The balance of the award above the payment of the deficiency judgment should be paid to trustees holding the lands for the benefit of persons having mechanics' liens thereon at the time they were taken by the city. *Matter of Mayor (Morris Avenue)*, 117.

2. *Same — interest — taxes accruing after taking of property not chargeable against award.* The right to compensation vests in the owners as a personal right at the moment of the taking of the property and interest begins to run from that date upon any award which may be made thereafter.

But sums due for taxes and assessments levied after the city became owner should not be deducted from the award.

When such taxes have been improperly withheld the person entitled to the award will not be remitted to a proceeding against the comptroller to recover the moneys, but the question may be disposed of in the condemnation proceeding. *Id.*

3. *Injury to easements by railroad viaduct — failure to show damage.* In an action to recover damages to the rental value of premises by the maintenance of a railroad viaduct in Park avenue in the city of New York, it appeared that there had been no diminution in the rental value of the upper portion of the building, and that the vacancy of the lower portion antedated the period for which damage was claimed, and was not caused by the building of the viaduct but by the passage of the Raines Law, which affected the value of the premises for saloon purposes. On all the evidence,

Held, that an award of damages was not warranted. *Bremer v. New York Central & H. R. R. Co.*, 139.

4. *Injury to easements by Park avenue viaduct in city of New York — limitation of action — prior action discontinued insufficient to interrupt acquisition of easement by adverse user.* The running of the period of twenty years whereby a railroad may acquire the right to maintain its structures in front of adjoining property by adverse user is not stopped by the bringing of a prior action for an injunction if the action was discontinued.

The rule that the bringing of an action which is subsequently discontinued does not interrupt the running of the Statute of Limitations applies equally to cases of prescriptive rights obtained by adverse user. *Poster v. New York Central & H. R. R. Co.*, 143.

**EMINENT DOMAIN — Continued.**

5. *Same — measure of damages for enlargement of viaduct.* But although a right to damages caused by reason of structures maintained for twenty years may be lost, yet, when new structures are added to those already in existence, the owner may recover the net difference in money between the effect of new and old structure while in actual use less the benefit conferred by the latter and also the damage inflicted by the temporary work during the period of user.

A defendant railroad, however, is not liable for the acts of the board of Park avenue improvement in the city of New York while the viaduct on that avenue was in the possession of the board for the purposes of construction. *Id.*

6. *Same — constitutional law — statute authorizing viaduct not unconstitutional.* The statutes requiring change in the viaduct structure in Park avenue are not unconstitutional, and in an action against the railroad by a private owner for damages caused by such structure, it is error to exclude evidence of said statutes and the contracts between the Park avenue board and the contractors for work done in pursuance thereof. *Id.*

7. *Compensation for taking building erected after proceeding is commenced.* As the title to real estate remains in the owner until it is actually taken by eminent domain, the owner may recover compensation for the taking of buildings erected thereon by him after the beginning of the condemnation proceedings, even though they were built for the purpose of recovering compensation from the city. *Matter of City of New York (Briggs Avenue), 224.*

8. *Same — measure of compensation therefor.* The question of good or bad faith in moving a building to the land for the purpose of securing compensation is immaterial, but in making the award the commissioners may consider the cost of again moving the building back on portions of the property not taken. *Id.*

9. *Appraisal of lands on condemnation — erroneous valuation — evidence of value.* The award of commissioners of estimate and appraisal for lands taken by the city of New York by eminent domain considered and confirmation refused.

On the appraisal of such land it is error to exclude evidence of the actual rents received upon the question of value. The rental of improved realty is relevant on the question of fee value.

It is error to consider evidence of what unimproved property would earn if apartment houses were built thereon, as it involves elements of uncertainty and speculation.

On the question of value it may be shown how much the market value of a lot is enhanced by a building thereon, but evidence of the structural cost of the building is not competent. *Matter of City of New York (Blackwell's Island Bridge), 272.*

10. *Trial — restriction upon redirect examination.* It is error to allow expert witnesses upon redirect examination to testify in regard to sale of pieces of property about which they had not been interrogated on cross-examination. *Id.*

11. *Condemnation of leasehold interest — when tenant entitled to compensation for fixtures taken.* On the condemnation of property, a tenant under a lease entitling him to renewals is entitled to compensation for the taking of such permanent machinery as has been built into the building and used in connection with the leasehold for business purposes and which has little or no value when separated from the property.

A tenant's right of renewal is appurtenant to the property and when destroyed on condemnation the tenant is entitled to compensation therefor.

On condemnation commissioners should specify in their report the specific property for which the award is made. *Matter of City of New York (North River Water Front), 863.*

**EMPLOYERS' LIABILITY ACT.**

*See MASTER AND SERVANT, generally.*

**EQUITY.**

One seeking equity must come with clean hands.

*See ASSIGNMENT, 3.*

Suit by creditor against stockholders for unpaid subscriptions — when legal action not prerequisite.

*See DEBTOR AND CREDITOR, 6-12.*

**EQUITY — Continued.**

Equity cannot order the issuance of liquor tax certificates after improper submission of local option.

*See* INTOXICATING LIQUOR, 2.

When partition agreement resting in parol enforced.

*See* PARTITION.

Allegation that various transactions were part of a scheme to defraud creditors.

*See* PLEADING, 10.

Action for general accounting against president of insurance corporation.

*See* PLEADING, 16.

Main issues should be determined by court before reference ordered.

*See* PRACTICE, 8.

Power of court to compel reference to determine equitable performance of contract to convey lands.

*See* REAL PROPERTY, 15.

When assignee of unmatured claim by insolvent takes subject to set-off.

*See* SET-OFF.

Equitable reconversion of proceeds of sale of real property by executor.

*See* WILL, 4.

*See* ACCOUNTING.

*See* CONVERSION.

*See* INJUNCTION.

*See* SPECIFIC PERFORMANCE.

**ESTOPPEL.**

Erroneous charge as to estoppel of depositor upon payment by bank to wrong person.

*See* BANKING, 2.

When question of estoppel from asserting title after sale of property under execution is for jury.

*See* CONVERSION, 4, 5.

Estoppel of receiver by acts of corporation.

*See* CORPORATION, 8.

Corporation estopped from pleading misnomer after answer.

*See* DEBTOR AND CREDITOR, 1, 2.

Failure to file contract of conditional sale — vendor estopped from asserting title against purchaser from vendee.

*See* SALE, 4.

**EVIDENCE.**

1. *When fact that defendant was insured may be shown as bearing upon the nature of contract with plaintiff.* Although it has been held in a former trial of an action to recover compensation for services in saving a stranded vessel that the fact that the owners had insurance upon the vessel cannot be shown, yet when on a new trial there is a question as to whether there was a contract for work, labor and services of which the State courts had jurisdiction or whether the plaintiff was acting solely as salvor, in which case Federal jurisdiction was exclusive, it may be shown that a bill of services rendered by the plaintiff was presented by the defendants to the insurance company as a basis of damage when proof was admitted, without objection, that there was insurance on the vessel, for the retention of such bill bore directly upon the question of the nature of the contract, as an admission of indebtedness, and as affecting the credibility of the defendants. *Merritt & Chapman Derrick & Wrecking Co. v. Tice*, 123.

2. *Parol evidence to show that written contract of sale was conditional.* Although parol evidence is admissible to show that a writing which is in form a complete contract was not to become binding until the performance of a condition precedent resting in parol, the evidence should be confined strictly to the condition. The rule does not admit general conversations had at the time of the execution of the contract, or the general circumstances under which it was executed. *Gilroy v. Emerson-Hickok Co.*, 783.

**EVIDENCE — Continued.**

3. *Supplementary proceedings — when seller and receiver in supplementary proceedings estopped from claiming title.* When chattels have been sold and delivered and the purchaser has resold the chattels for value without the original owner ever having sought to retake the property upon the ground that title had not passed because an alleged condition precedent had not been performed, the owner and its receiver will be deemed to have waived compliance with the condition and are estopped from claiming that title did not pass to the second purchaser. *Id.*

4. *Same — when receiver cannot show want of consideration for transfer.* A receiver in supplementary proceedings only obtains title to property owned by the judgment debtor at the time of his appointment. When the judgment debtor transferred property prior to the receivership the receiver cannot show lack of consideration in an action of replevin. Even if the transfer be fraudulent as to creditors, the action to set aside the transfer for lack of consideration must be in equity. *Id.*

5. *Replevin — insufficient evidence of defendant's damage.* When in an action of replevin no evidence as to the value of the property at the time of trial is given other than the plaintiff's affidavit as to its value made four years prior to trial, the jury is not entitled to assess the defendant's damages at the figure stated in the affidavit. *Id.*

Improper questions to show that defendant in negligence action is insured.

*Cobb v. United Engineering & Contracting Co., 904.*

When appellant entitled to have evidence excluded on objection of the respondent appear in case.

*See APPEAL, 3.*

When affidavit of president may be used as evidence against a corporation.

*See CORPORATION, 3.*

Defendant may show reputation for peaceable disposition.

*See CRIME, 5, 6.*

Proof of previous crime excluded.

*See CRIME, 7.*

Erroneous admission of false money found in defendant's possession unconnected with larceny — sufficiency of objection.

*See CRIME, 9, 10.*

Sustaining conviction of robbery in the first degree.

*See CRIME, 12.*

Executing and uttering forged deeds — person whose name is forged not a necessary witness — proof of prior conveyances to fictitious grantee to show scheme to defraud.

*See CRIME, 13-16.*

Hearsay testimony as to rental value of mill.

*See DAMAGES, 4.*

Judgment creditor's action — judgment roll admissible against trustee to establish debt — *res adjudicata* — when release in prior action admissible to show satisfaction.

*See DEBTOR AND CREDITOR, 13-15.*

Proof of rent as bearing upon value of property condemned.

*See EMINENT DOMAIN, 9.*

Restriction upon the right to redirect examination of expert.

*See EMINENT DOMAIN, 10.*

Of negligence, contributory negligence and damages.

*See NEGLIGENCE, generally.*

Upon sale of real property by metes and bounds the understanding of "more or less" by the parties is inadmissible.

*See REAL PROPERTY, 4.*

Erroneous proof of damage upon breach of contract to deliver lumber.

*See SALE, 8.*

**EVIDENCE—Continued.**

Oral testimony to explain shipping receipt showing delivery to third party.

See SALE, 10.

Erroneous charge as to effect of attempt to bribe witness and failure to produce witnesses.

See TRIAL, 1, 2.

Probate against testimony of subscribing witnesses.

See WILL, 5.

Lay witnesses may not characterize mental state of testator.

See WILL, 9.

Burden of proof to establish will where testator's physician is sole beneficiary.

See WILL, 8, 10.

**EXAMINATION BEFORE TRIAL.**

See DEPOSITION, generally.

**EXECUTION.**

Action against sheriff for conversion after sale of property under an execution—estoppel from asserting title.

See CONVERSION, 4, 5.

Failure of bidder on sheriff's sale to complete purchase—when purchaser loses title because of judgment against sheriff in another action.

See REAL PROPERTY, 8, 9.

**EXECUTOR AND ADMINISTRATOR.**

1. *Administrator whose letters are revoked on probate of will not reinstated by judgment declaring probate invalid—such administrator not entitled to continue former action.* After letters of administration were issued an alleged will was discovered and subsequently admitted to probate, the decree revoking the prior letters of administration. Thereafter, in an action under section 2653a of the Code of Civil Procedure, the will was declared not to be the will of the decedent, and the probate was adjudged invalid. The prior administrator on his appointment had brought action to reach property alleged to belong to the estate.

*Held*, that the action abated on the revocation of the letters of administration and could only be revived by the reappointment of an administrator in a new proceeding;

That the fact that the decree admitting the will to probate was vacated did not reinstate the former administrator;

That the decree of the surrogate revoking the letters of administration released the surety of the administrator from liability, and hence the former administrator not having given an enforceable bond was not entitled to continue the former action. *Belden v. Belden*, 296.

2. *When legatee of a deceased beneficiary cannot compel executors of a deceased executor to account.* Although a deceased executor and trustee has never accounted for the trust estate, any right of a beneficiary to an accounting passes on his death to his personal representatives for the benefit of his estate, and his widow individually or as sole legatee and devisee has no cause of action enforceable in her own right. *Bushe v. Wright*, 320.

3. *Same—concurrent jurisdiction of surrogate and Supreme Court on accounting by executors.* The Supreme Court and the Surrogate's Court have concurrent jurisdiction to compel executors and trustees to account, but the Supreme Court will only act where the Surrogate's Court may not have full jurisdiction to decide the questions, as where there are conflicting claims to real estate. *Id.*

4. *Same.* When the executors of a deceased executor bring an action in the Supreme Court for the judicial settlement of their accounts, the representatives of a deceased beneficiary of the estate under administration by the deceased executor has no standing to compel the executors of the deceased executor to account for his acts when it is shown that he never made an accounting; especially so, when all parties interested in the unadministered estate are not before the court and it is not certain that the Statute of Limitations had run upon their claims. *Id.*

**EXECUTOR AND ADMINISTRATOR — Continued.**

5. *Same* — *findings not embodied in report not available.* A finding by a referee that the creditors and legatees of the prior estate have all been paid will not be considered when not contained in the report but only in separate findings.

Although when there is a defect of parties defendant, they will ordinarily be brought in on terms, the rule does not apply when in an action by the executors of a deceased executor for an accounting of his estate, the defendant raises new issues by asking them to account for the acts of the testator as executor of his wife. *Id.*

6. *Same.* Although under section 2806 of the Code of Civil Procedure the surrogate has jurisdiction when an executor dies to compel the executor of the deceased executor to account, on petition of his successor, as if the decedent had lived and his letters had been revoked and a proceeding for accounting been instituted against him, the section contemplates that the funds so reached should not be paid to a creditor or legatee instituting the accounting but to the successor of the deceased executor or into court or to some person authorized by law to receive the fund. *Id.*

7. *Limitation of action against executors.* A beneficiary's right to an accounting from the representatives of a deceased executor accrues the moment they are appointed, and the Statute of Limitations runs in ten years, except as suspended by a period of infancy. *Id.*

8. *Proceeding to revoke letters testamentary — petition should specify misconduct.* In a proceeding under subdivision 2 of section 2885 of the Code of Civil Procedure for the revocation of letters testamentary on the ground that the executor is guilty of misconduct, the petition should specifically set forth the charges of misconduct and a removal should not be based on matters outside of the issues presented.

Although an executor has invested portions of the estate in western mortgages and has loaned money upon a promissory note, which investments are unauthorized, it is not ground for revoking his letters when the estate has suffered no loss thereby and his accounts have been judicially settled.

An executor is removed to protect the estate, not to punish him; and he should not be removed when the fund is not put in jeopardy. *Matter of Burr*, 482.

9. *Proceeding to appoint administrator with will annexed — unauthorized amendment.* A petition for the appointment of an administrator with the will annexed was made upon the ground that one executor had died and the other had been removed. The petition did not show what relationship the person nominated bore to the estate of the deceased or that there was no other person entitled to letters as of prior right who were cited or had renounced. No action having been taken on the objections filed, the petitioner, without permission of court or further citation, filed another petition asking the appointment of an administrator with the will annexed.

*Held*, that the second petition was not an amendment, of the original petition and had no place in the proceeding;

That the appointment of the person nominated was unauthorized, either on the first petition which did not show him entitled to letters, or under the second unauthorized petition. *Matter of Sheldon*, 488.

10. *Setting off household furniture for widow by appraisers.* In setting off household furniture not exceeding \$150 in value to a widow, under subdivision 4 of section 2713 of the Code of Civil Procedure, the appraisers, when the total value of the household furniture is less than that sum, cannot make up the balance by giving her farm animals and other property. *Matter of Griffin*, 515.

11. *Property of estate acquired by executor in his own name impressed with trust.* When on the sale of lands under a foreclosure brought by a testator his executors purchase in their individual names, they hold the property in trust as personally for which they are liable to account.

An executor who, by reason of paralysis which incapacitated him, leaves the management of the estate to his coexecutor who is an attorney and apparently competent to transact the business, is not guilty of a breach of trust.

When, instead of disposing of lands with due diligence and dividing the proceeds among those entitled thereto, executors trade the property for other property, they become personally responsible for the value of the land at the time of

**EXECUTOR AND ADMINISTRATOR** — *Continued.*

the exchange, unless it were made with the consent of the persons entitled to the estate or were subsequently ratified by them. *Hine v. Hine*, 585.

12. *Election of beneficiaries to share in property received in exchange — effect of assignment of claim by beneficiary.* But when a mortgage upon the lands so taken in exchange by the executors is foreclosed and a person entitled to share in the proceeds assigns his interest "if any" in the surplus money, he is bound by an election, and is not entitled to charge the executors with his portion of the value of the lands exchanged, even though in his assignment he stated that he made "no claim whatever to such surplus moneys or any part thereof."

Such assignor is as much bound by his assignee's receipt for the share of the surplus as if he had received it himself.

A *cestui que trust* is at liberty to elect to approve an unauthorized investment by the executors or to reject it, but he must either affirm or disaffirm, and having once made his election it is binding on him. *Id.*

13. *Election of remedies.* Thus, when a legatee holding property of the estate in which other legatees have interests, transfers it to the executor who converts it to his own use and is compelled by the other legatees to account therefor, there is an election of remedies by them and they cannot thereafter hold their collegatee on an implied trust. *Id.*

14. *Liability of administrator for obligations of his firm to the estate.* When a member of a firm is appointed administrator of an estate to which his firm is indebted he is chargeable with the indebtedness, and notes and checks which represent the debt will be treated as so much money in his hands for the usual purpose of administration. *Matter of Ablovich*, 626.

15. *Same — effect of revocation of letters.* Nor does he cease to be chargeable with the indebtedness of his firm because his letters are revoked before the estate is administered and the firm obligations are turned over to and accepted by his successor. *Id.*

Action upon alleged promise of decedent to make legacy in consideration of services.

*See CONTRACT*, 3.

Power of court to require testamentary trustees to exhibit records of their acts in foreign jurisdiction.

*See DISCOVERY*, 1.

When legatees authorizing executor to continue business not liable as partners.

*See PARTNERSHIP*, 1.

Revival of action against executor of deceased defendant.

*See PRACTICE*, 4.

When surrogate should not set aside stipulation settling controversies as to executor's accounts.

*See STIPULATION*.

Necessary parties to action by widow against trustee as executor for husband's father.

*See TRUST*, 3.

Liability of representative of deceased life beneficiary for trust moneys misappropriated.

*See TRUST*, 4.

Jurisdiction of State courts over foreign executor holding lands in this State.

*See WILL*, 1.

When power of sale to executor does not fail through invalidity of a part of bequest — equitable reconversion.

*See WILL*, 2.

**FACTOR.**

Commissions of factor on damaged goods taken over by insurer.

*See PRINCIPAL AND AGENT*, 12.

**FIRE INSURANCE.**

*See INSURANCE*, 6-10.



**FOREIGN CORPORATION.**

When foreign unincorporated college cannot take trust for charitable use.  
*See WILL, 14.*

**FOREST, FISH AND GAME LAW.**

Section 141 constitutional—sale of English pheasants killed in other States unlawful.

*See GAME LAW.*

**FORGERY.**

Concealment of larceny by false entry in account book.

*See CRIME, 1-3.*

Deposit of check with knowledge that prior indorsement was forged.

*See CRIME, 11.*

Executing and uttering forged deeds—person whose name is forged not a necessary witness.

*See CRIME, 13-16.*

When over-payments made to messengers on forged bills may be recovered from the principal.

*See PRINCIPAL AND AGENT, 10, 11.*

**FRAUD.**

Action by receiver to set aside assignment of trade marks as in fraud of creditors—facts not showing fraud.

*See ASSIGNMENT, 1-3.*

Facts showing unfair dealings upon sale by bailee of pledged stock after waiver of right.

*See BAILMENT, 2.*

Breach of contract to pool stocks.

*See CONTRACT, 1, 2.*

When transfers of corporate property constitute fraud against creditors.

*See DEBTOR AND CREDITOR, 4.*

Allegation that various transactions were part of a scheme to defraud creditors.

*See PLEADING, 10.*

When deed executed by spendthrift creating trust for his own benefit is not procured by fraud.

*See TRUST, 1-3.*

**GAME LAW.**

1. *Sale of English pheasants killed in other States unlawful.* By virtue of section 31 of the Forest, Fish and Game Law, providing that there shall be no open season for English pheasants, nor shall the same be killed or possessed except in the county of Suffolk until the year 1910, and that such pheasants bred or liberated in Suffolk county by game clubs and private owners may be possessed in Greater New York for consumption but not for sale, and by virtue of section 141 of the said act which provides that the prohibitions therein contained refer equally to game coming from without the State, a defendant who offers English pheasants killed in another State for sale in the city of New York is properly convicted of a violation of the statute. *People v. Waldorf-Astoria Hotel Co., 723.*

2. *Same—section 141 of the Forest, Fish and Game Law not unconstitutional.* Section 141, prohibiting the possession of game brought from foreign States, is not in violation of the State or Federal Constitution. *Id.*

**GAS AND ELECTRICITY.**

*Injunction to restrain shutting off gas denied when consumer refuses to give security for payment.* There is nothing in chapter 125 of the Laws of 1906 fixing the price of gas in the city of New York which in any way repeals, modifies or affects the sections of the Transportation Corporations Law, which provide that a gas company may require a deposit as security for the payment of gas.

Hence, a consumer who refuses to make such deposit on demand is not entitled to an injunction restraining the company from shutting off his supply. *Polite v. Consolidated Gas Co., 92.*

**GIFT.**

*Deposit of money payable to depositor or his brother — when no gift or trust created.* When one deposits money in a bank and accepts certificates of deposit payable to his own order or that of his brother, with the express intention that he shall use the money during his lifetime and that what he leaves at his death shall go to his brother, and the certificates remain in the possession of the depositor to the time of his death, there is no gift or trust in favor of the brother, but merely an attempt to do that in the future which can only be done by will. *Turnbull v. Turnbull*, 449.

*See* CHARITABLE USES, generally.

**GUARANTY.**

1. *Contract of guaranty construed.* The defendant being a stockholder and president of a domestic corporation guaranteed parties selling goods to his corporation the payment of any bills "unless I notify you to the contrary, providing the amount of the credit shall not exceed \$5,000 at any one time."

*Held*, that the defendant did not intend by his contract to deprive his corporation of obtaining a credit above \$5,000, but intended merely to limit his liability to that sum;

That if a contract of guaranty drawn by the guarantor be ambiguous it will be interpreted most strongly against him;

That words of limitation in a guaranty are to be construed as limiting the liability of the guarantor, and not as a condition as to the extent of credit to be given, a breach of which will release him. *Schinasi v. Lane*, 76.

2. *Contract construed — failure of obligee to exhaust remedy on assignments made by principal — judgment overruling demurrer based upon order — permission to withdraw demurrer.* The plaintiffs had entered into an agreement with a corporation of which the defendant was secretary whereby they were to make advances to the corporation and all sales of its goods were to be made through the plaintiffs, all accounts being payable to them. In case of failure of customers to pay, the loss was to be shared equally between the plaintiffs and the corporation. Thereafter the defendant secretary personally guaranteed to hold the plaintiffs harmless from any loss arising out of business transactions with the corporation. In an action against the defendant personally upon his guaranty.

*Held*, that it was a good defense to allege that the plaintiffs as assignees of the collectible claims of the corporation had neglected to collect the same, failed to bring actions against the debtors and had not exhausted their remedies against them or the corporation;

That the complaint was defective in that it did not show that the plaintiffs had been and will be unable to realize from the assigned accounts the advances made by them to the corporation;

That an order overruling a demurrer and directing an interlocutory judgment is a decision and effective as the basis of the interlocutory judgment;

That a judgment overruling a demurrer is erroneous in so far as it does not permit the withdrawal of the demurrer. *Nachod v. Hindley*, 658.

*See* PRINCIPAL AND SURETY, generally.

**HABEAS CORPUS.**

When warrant of commitment after conviction of crime sufficient.

*See* CRIME, 4.

**HIGHWAY.**

Collision between motor car and vehicle — law of the road.

*See* NEGLIGENCE, 14.

Injury to pedestrians and vehicles upon.

*See* NEGLIGENCE, generally.

**HUSBAND AND WIFE.**

Recovery for loss of wife's services through injury.

*See* NEGLIGENCE, 2.

When foreign statute legitimatizing children on marriage of parents binding here.

*See* PARENT AND CHILD.

When widow of spendthrift may contest validity of trust deed executed by him for his own benefit — necessary parties.

*See* TRUST, 3.

**INFANT.**

Child injured while crossing city street — failure to look.

See NEGLIGENCE, 4.

When deed executed by spendthrift creating trust for his own benefit is not procured by fraud.

See TRUST, 1-3.

**INJUNCTION.**

1. *Reference to assess damage — must await final determination.* A reference to determine the damages sustained by a defendant by reason of an injunction should not be granted until it is finally determined that the plaintiff is not entitled to the injunction.

An interlocutory judgment sustaining a demurrer to the complaint is not such final determination as justifies the court in granting an order of reference if the plaintiff has appealed from the judgment. In such case the right to assess damages is suspended until the determination of the appeal. *Brown v. Utopia Land Co. (No. 1)*, 190.

2. *To restrain use of trade name — right to name not lost by unauthorized use by others.* When a manufacturer has established a market for cream cheese under the brand "Philadelphia cream cheese," the fact that others have attempted to appropriate the trade name without the owner's consent does not establish any abandonment thereof by him.

Nor does the fact that such manufacturer sells other brands of cheese together with the Philadelphia cheese, all being put out under a registered trade mark, destroy the right to the specific trade name "Philadelphia" as applied to one brand of cheese. *International Cheese Co. v. Phenix Cheese Co.*, 499.

Order granting injunction reversed where allegations on which it is based were disproved at trial.

*Puff v. Standard Gas Light Co.*, 904.

To restrain execution of warrant of dispossession issued in summary proceedings.

*Carmer v. Rhodes*, 915.

When failure to sue stockholders within two years excused because of injunction.

See DEBTOR AND CREDITOR, 11.

Order restraining shutting off gas denied when consumer refuses to give security for payment.

See GAS AND ELECTRICITY.

Facts necessary to authorize injunction against carrying on partnership business.

See PARTNERSHIP, 2.

Right of insurance company to revoke agency and enjoin agent from acting.

See PRINCIPAL AND AGENT, 1.

**INSOLVENCY.**

Liquidating agent of national bank may be sued in State court.

See BANKING, 3.

When Attorney-General acts in good faith in action to dissolve corporation — facts requiring decree of dissolution.

See CORPORATION, 4, 5.

See BANKRUPTCY, generally.

**INSPECTION OF BOOKS AND PAPERS.**

See DISCOVERY, generally.

**INSURANCE.**

1. *Provisions as to payment of premiums on life insurance construed — premium notes accepted by the insurer, but not paid, not effective as payment of premiums.* In an action upon policies of life insurance it appeared that after two or more annual premiums had been fully paid the policy became a paid-up, non-forfeiture policy; that if the amount of any annual premium or interest due on any note taken in part payment of a former annual premium were not fully paid, the policy should be null and void and forfeited except as respects annual payments

**INSURANCE — Continued.**

for prior years which have been fully made, and that if any note, check or draft shall be given in payment or part payment of any premium and such note, check or draft shall not be paid according to the provisions thereof, the policy became immediately void except as respects payments for prior years. It further appeared that of the first annual premium only sixty per cent had been paid, but for the remaining forty per cent of the premium a one-year note was given. Only sixty per cent of the second premium was paid and the principal of the former premium note was included in a new premium note also payable twelve months from date. Similar settlements were made each year for six years, the principal of each premium note being included in the principal of the new premium note taken for part payment of the premiums when due. The first premium note provided that if not paid at maturity all benefits which would have accrued for full payment became void and forfeited to the company. The subsequent premium notes did not contain said provision, but in accepting each note the surplus apportioned to the policy was deducted from the notes before the renewal note was given.

*Held*, that the beneficiary stood in no contract relations with the company except as she was entitled to reap the profits of performance by the insured;

That the premium notes were not payments, but merely means of securing payment, and effective only to extend the time therefor, and never having been paid the original indebtedness was revived and the beneficiary was not entitled to recover on the policies;

That although the later notes contained no provision as to forfeiture of benefits in case of non-payment, it was immaterial, as the failure to pay the later notes revived the former note containing such clause and deprived the beneficiary of rights under the non-forfeiture clause.

*Held, further*, that the insurer by accepting the notes of the insured from year to year did not thereby rely upon his personal responsibility and agree to pay the beneficiary in full, but was entitled to offset against the sum due under the policy any sum due from the insured. *Hoar v. Union Mutual Life Insurance Co.*, 416.

2. *Proceeding to set aside election of directors — when by-laws fixing number of directors must be adopted by policyholders.* By virtue of section 209 of the Insurance Law every insurance corporation, other than secret fraternal societies, must, before the adoption of by-laws, cause the same to be mailed to the members and directors with a notice of the time and place when the same shall be considered. The policyholders have the sole power to adopt by-laws governing the number of directors or fixing their term of office.

Even such by-laws as may be adopted by the board of directors under section 29 of the General Corporation Law are not valid unless published at least once a week for two successive weeks in a newspaper in the county where the election is to be held and at least thirty days before such election as required by subdivision 5 of section 11 of the General Corporation Law.

It follows that the executive committee of a co-operative assessment insurance corporation, reincorporated under section 206 of the General Insurance Law, cannot adopt by-laws fixing the number and term of office of directors without due notice to the policyholders, and directors elected pursuant to by-laws so adopted are not entitled to office. *Matter of Empire State Supreme Lodge*, 616.

3. *Same — power of court to review election.* Section 27 of the General Corporation Law, giving the Supreme Court power to review corporate elections, applies to corporations organized under the Insurance Law. *Id.*

4. *Same — parties — policyholder may contest validity of election.* Aggrieved policyholders seeking to set aside an election by a proceeding under said section are not required to give notice to all policyholders of the company. Notice to the corporation itself and the directors, the legality of whose election is challenged, is sufficient.

Policyholders are entitled to contest the validity of such election in a proceeding under section 27 of the General Corporation Law, and action by the Attorney-General under section 1948 of the Code of Civil Procedure is not necessary.

When the election attacked is wholly illegal and without authority the policyholders seeking to set it aside need not show that a different result will be had in the event of a legal election. *Id.*

**INSURANCE**—*Continued.*

5. *Same*—when notice of election insufficient to constitute estoppel. The publication of notice of the annual meeting of policyholders of such insurance corporation in its official journal, which makes no mention of the proposed election of directors, does not estop policyholders who fail to appear at the meeting. *Id.*

6. *Same*—former directors hold over when election set aside. When a co-operative insurance association, originally incorporated under chapter 175 of the Laws of 1883, reincorporates under section 206 of the General Insurance Law, its corporate entity is not changed; but it merely becomes entitled to the benefits and privileges of the latter act. Hence, by virtue of the provisions of section 23 of the General Corporation Law, when an election of directors is wholly void, the former board elected under the original act of incorporation holds office until successors are duly elected.

The court, in declaring an election of directors wholly void, will not continue the directors so elected in office until their successors are legally chosen. *Id.*

7. *Fire insurance on motor vehicle.* Under a policy of fire insurance upon an automobile indemnifying against damage by fire, except damage "caused by fire originating within the vehicle," the insured is entitled to indemnity for a loss caused by the ignition of gasoline liberated by the overturning of the vehicle, which ignition was caused by a lighted lamp attached to the exterior of the vehicle. Such fire does not originate within the vehicle within the meaning of the policy. *Preston v. Aetna Insurance Co.*, 784.

8. *Sims*—contract construed. If a provision of a policy is susceptible of two constructions, so that reasonable men would differ as to its meaning, that construction most favorable to the insured will be adopted, especially where the liability of the insurance company is general and a fire is sought to be brought within an exception to the general liability. *Id.*

9. *Fire insurance on motor vehicle—contract construed.* Under a policy of fire insurance upon an automobile, providing that the insurer is not liable for fire "originating in the automobile itself," the insured may recover damages caused by gasoline liberated by an accident and ignited by a lamp attached to the exterior of the vehicle. *Preston v. Union Assurance Society*, 788.

10. *When fire insurance forfeited on assignment of corporate assets.* A floating policy of fire insurance upon goods issued to one corporation is forfeited under the clause in the standard form of policy when the corporation transfers all its assets and business to a new corporation formed for the purpose of taking the assets over.

Corporations are distinct entities and such assignment is a complete change of ownership within the forfeiture clause. *Cremo Light Co. v. Parker*, 845.

When policies secretly purchased by attorney are impressed with trust for client. *See ATTORNEY AND CLIENT*, 6.

When fact that vessel was insured can be shown in action to recover for services in saving it.

*See EVIDENCE*, 1.

Action by insurance corporation against its president to recover moneys expended for illegal purposes and upon improvident contracts.

*See PLEADING*, 12-15.

Action for general accounting against president of insurance corporation.

*See PLEADING*, 16.

Complaint of insurance company against its president to recover moneys obtained pursuant to a conspiracy.

*See PLEADING*, 17.

Complaint of insurance corporation against officer made more definite and certain.

*See PLEADING*, 18.

Complaint of insurance company against officer to recover for negligence.

*See PLEADING*, 20.

Right of insurance company to revoke agency and enjoin agent from acting.

*See PRINCIPAL AND AGENT*, 1.

Right of agent to commissions on renewal premiums after his discharge.

*See PRINCIPAL AND AGENT*, 3.

**INTEREST.**

Right of member of building loan association to interest upon withdrawal therefrom.

*See* BUILDING LOAN ASSOCIATION.

Upon recovery for breach of contract.

*See* CONTRACT, 8.

No interest on unliquidated claim for damages.

*See* DAMAGES, 2.

Upon award in condemnation proceedings.

*See* EMINENT DOMAIN, 2.

**INTERLOCUTORY JUDGMENT.**

*See* JUDGMENT.

**INTOXICATING LIQUOR.**

1. *Local option — resubmission of question after illegal vote.* If a town vote on local option is illegal and of no effect the parties seeking to invalidate the election must find their redress under section 16 of the Liquor Tax Law, providing that if the questions be not properly submitted at the town meeting they shall be again submitted at a special meeting. *Raymond v. Clement*, 528.

2. *Same — court has no power to order issuance of liquor tax certificate.* The only way in which a party aggrieved can be relieved from the effect of an improper submission of the excise questions is by application to have the submission declared improper and illegal and for a resubmission of the questions to the electors of the town. A court of equity has no power on declaring an election void to order the county treasurer to issue liquor tax certificates. *Id.*

3. *When double house is not two buildings within the meaning of the Liquor Tax Law.* Under subdivision 8 of section 17 of the Liquor Tax Law requiring the consent of the owners of two-thirds of the total number of buildings within 200 feet of a saloon as a condition precedent to the granting of a liquor tax certificate, it is the number of buildings which controls and not the number of residents or the number of families or the number of owners of buildings.

A double frame building covered by one roof, divided by a partition in the middle, with separate staircases and separate front and rear entrances, which rests upon one entire wall with no mason work partition, the two portions of which are connected by a door, etc., is one building, not two buildings, within the meaning of the statute, although intended to be used by two families and although the owner has conveyed one portion of the building to his wife. *Matter of Clement (Dunbar Certificate)*, 575.

4. *Same — certificate revoked for failure to file requisite consent.* Thus, when said double building and one other building are the only dwellings within 200 feet of the premises for which the certificate is issued, and only the owners of the double building have consented to the traffic in liquors, the required two-thirds consent has not been obtained and the liquor certificate should be revoked. *Id.*

5. *Same — stay of proceedings.* Although in a proceeding to revoke a liquor tax certificate all proceedings by the petitioner have been stayed after final order revoking the certificate without a notice of appeal having been served and without requiring it to be served, no harm has been done when as a matter of fact the appeal was immediately taken and the case argued upon its merits. *Id.*

**JOINDER OF ACTION.**

Action for accounting and damages in tort cannot be united.

*See* PLEADING, 8.

**JUDGMENT.**

1. *Foreign judgment — service of process on Commissioner of Insurance of North Carolina.* The rule that a valid personal judgment can be obtained against a defendant insurance company in the courts of North Carolina by service of process upon the Commissioner of Insurance of that State, where the policy was issued by the defendant to a resident of that State prior to the revocation of the designation of such Commissioner as the person upon whom process may be served, applies equally to a policy which although originally issued to a resi-

**JUDGMENT** — *Continued.*

dent of South Carolina was assigned to a resident of North Carolina before the designation was revoked.

The assignee is deemed to take the policy relying upon the designation which as to him is irrevocable the same as if the policy were issued to him directly. *Hunter v. Mutual Reserve Life Insurance Co.* (No. 4), 94.

2. *Interlocutory judgment, how construed.* Ordinarily the affirmance of an interlocutory judgment establishes the law respecting the final judgment, but where the interlocutory judgment is ambiguous it will not be so interpreted as to do manifest injustice. *Hasell v. Buckley*, 356.

3. *Same* — contract to pay percentage of commissions earned through recommendation of plaintiff. Thus when the plaintiff sues for an accounting on a contract whereby the defendant agreed to pay the plaintiff's testator one-half of the commissions received by the defendant as purchasing agent so long as the testator succeeded in inducing the principal to employ the defendant, an interlocutory judgment that the plaintiff was entitled to an accounting for one-half of all the commissions received by the defendant should not be so construed as to mean that the latter was liable for commissions on sums earned under a subsequent specific contract of employment by the principal, with the procuring of which the plaintiff's testator had nothing to do. *Id.*

4. *Same.* The interlocutory judgment should only be construed as a decision that the defendant account, and not as establishing the amount of the recovery. *Id.*

Appeal from judgment on demurrer brings up the propriety of order on which it is founded.

*See* APPEAL, 1.

Decision of General Term *res adjudicata* upon subsequent appeal to Appellate Division.

*See* APPEAL, 2.

Judgment based upon inconsistent findings reversed upon appeal.

*See* APPEAL, 4.

Erroneous entry upon report of a referee.

*See* ATTORNEY AND CLIENT, 8.

Action by assignees of obligee against obligor — erroneous judgment for assignee who was made a codefendant.

*See* CONTRACT, 7.

Certified copy of judgment in criminal case warrants execution thereof.

*See* CRIME, 4.

Necessary parties in judgment creditor's action to establish a lien upon property after two assignments.

*See* DEBTOR AND CREDITOR, 8.

Judgment creditor's action for affirmance of deed of trust for benefit of creditor — judgment-roll admissible against trustee to establish debt — *res adjudicata*.

*See* DEBTOR AND CREDITOR, 13-15.

When order for inspection of one affidavit not *res adjudicata* as to inspection of similar affidavit.

*See* DISCOVERY, 2.

Order overruling demurrer as basis for interlocutory judgment.

*See* GUARANTY, 2.

Interlocutory judgment does not justify reference to assess damages to defendant in injunction action.

*See* INJUNCTION, 1.

Police commissioner may not decree dismissal of officer upon proceedings had before his predecessor.

*See* MANDAMUS, 2.

Decision of Attorney-General is not *res adjudicata* as to successor.

*See* QUO WARRANTO.

**JUDGMENT—Continued.**

When requisition against sheriff cancels incomplete sale under an execution in another action.

See REAL PROPERTY, 8, 9.

When parties admit facts the decree must be in accordance therewith.

See REAL PROPERTY, 13.

When judgment of foreign court not binding upon remaindermen not made parties to action.

See TRUST, 4.

**JUSTICE'S COURT.**

*When return of justice of peace may be amended.* When on a motion to amend the return of a justice of the peace it appears by the affidavit of the justice that a judgment rendered on the defendant's default was made on the oral evidence of the plaintiff reduced to writing instead of upon a verified complaint as erroneously stated in the return, the return should be amended to show the true facts.

Although there are authorities to the effect that the return of a justice of the peace may not be contradicted by an amended return, they do not apply to a case where the justice admits a mistake and seeks to correct it. On the same principle a mistake admitted by the justice may be corrected on motion of a party. *Pitkin v. Clifford*, 509.

**LABOR LAW.**

Injury by breaking of plank upon horses — when structure not a scaffold under the Labor Law.

See NEGLIGENCE, 23.

**LACHES.**

Application to revive action denied.

See PRACTICE, 5.

**LANDLORD AND TENANT.**

*Breach of covenant for quiet enjoyment — when landlord liable.* In an action by a tenant against his landlord for the breach of a covenant for quiet enjoyment it appeared that the keys of the building were by consent left with third persons for delivery to the plaintiff, but he could not obtain the keys. It appeared moreover that the landlord refused possession unless the tenant agreed to pay half of the expense of repairing frozen water pipes.

*Held*, that a reversal of judgment for damages for breach of covenant was not warranted. *Garrison v. Hutton*, 455.

When tenant entitled to compensation for fixtures taken upon condemnation of leasehold interest — right to remove.

See EMINENT DOMAIN, 11.

**LARCENY.**

Erroneous admission of false money found in defendant's possession unconnected with crime.

See CRIME, 9, 10.

**LIBEL.**

1. *Letter charging plaintiff with sending obscene letters — when complaint fails to state cause of action.* The complaint in an action for libel must state more than conclusions of fact; facts themselves must be alleged from which the conclusions may be drawn.

Hence, in an action for libel in writing a letter which charged the plaintiff with writing letters which, by innuendo, are said to be obscene, the complaint is subject to demurrer, as the characterization of the letters is a mere conclusion. The contents of the letters alleged to be obscene should be set forth. *McNamara v. Goldan*, 221.

2. *Publication charging drunkenness — when libelous per se.* An article charging that the plaintiff staggered into a police station claiming that he was poisoned and fell to the floor with a crash and that his wife stated that for the past three weeks he had been "celebrating," which article is stated by innuendo to accuse the plaintiff of drunkenness in a public place, etc., is libelous *per se* because it imputes drunkenness to the plaintiff which tends to degrade and render him



**LIBEL** — *Continued.*

odious, and also because it charges him with intoxication in a public place, which is a crime punishable by fine or imprisonment.

Although "celebrating" is not defined by Webster as indulging in intoxicating liquors to excess, the word as used aforesaid may convey that idea. *Morse v. Star Co.*, 256.

**LIEN.**

1. *Mechanic's lien on municipal improvements — when lien cannot be canceled by order.* The only authority to discharge a mechanic's lien on motion is that contained in the statute and a municipal lien cannot be canceled on motion on the ground that an action has not been brought to enforce the same within the time prescribed by statute.

The statute is self-operative and if an action to enforce it be not brought within ninety days after filing the lien, and if notice of pendency thereof be not filed within the same period with the financial officer of the municipal corporation with whom the notice of lien was filed the lien is discharged without order or action, except where it has been continued by order of the court. *Matter of Rudiger*, 86.

2. *Mechanic's lien — discharge thereof on undertaking by assignee.* Although the statute only expressly authorizes the discharge of a mechanic's lien upon the application of a contractor who gives an undertaking, an assignee is equally entitled to the discharge, whether he be assignee of the entire contract or a part only of the moneys due thereunder.

But the assignee, whether of the whole contract or part thereof, must give an undertaking for the payment "of any judgment which may be recovered in an action to enforce the lien," even though thereby he becomes responsible for the debts of third parties. *Russell & Erwin Mfg. Co. v. City of New York*, 88.

3. *Mechanic's lien — action against surety on bond given to discharge lien — leave of court.* When a mechanic's lien has been discharged by the giving of an undertaking pursuant to subdivision 4 of section 18 of the Lien Law, the lienor is not required to obtain leave of court to bring action against the surety but may join him as defendant without leave.

Section 814 of the Code of Civil Procedure, requiring leave of court before bringing action for a breach of the condition of a bond, has no application to bonds given to discharge a mechanic's lien which merely take the place of the real estate upon which the lien was filed.

On the discharge of a mechanic's lien by the giving of an undertaking, the lienor may either foreclose against the debtor alone, and if he recover judgment establishing the validity of the lien may maintain an action against the surety, or he may sue in equity against the debtor and surety jointly to establish the validity of the lien and for a personal judgment against the debtor and surety. *Pierce, Butler & Pierce Manufacturing Co. v. Wilson*, 662.

Action to enforce attorney's lien after settlement by client.

See ATTORNEY AND CLIENT, 1.

Necessary parties in judgment creditor's action to establish a lien upon property after two assignments.

See DEBTOR AND CREDITOR, 3.

Filing of mechanic's lien inconsistent with claim of title.

See SALE, 2.

**LIFE INSURANCE.**

See INSURANCE, 1-6.

See PLEADING, 12-20.

**LIMITATION OF ACTION.**

When failure to sue stockholders within two years excused because of injunction.

See DEBTOR AND CREDITOR, 11.

Statute of Limitations upon beneficiary's right to accounting by the representative of a deceased executor.

See EXECUTOR AND ADMINISTRATOR, 7.

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**LIMITATION OF ACTION — Continued.**

Effect of Statute of Limitations upon revival of action.

See PRACTICE, 5.

When Statute of Limitations begins to run against remaindermen.

See TRUST, 4.

**LIQUOR TAX LAW.**

See INTOXICATING LIQUOR, generally.

**LOCAL OPTION.**

Resubmission of question after illegal vote.

See INTOXICATING LIQUOR, 1, 2.

**MAINTENANCE.**

Evidence insufficient to show illegal consideration for contract of retainer.

See ATTORNEY AND CLIENT, 1.

**MANDAMUS.**

1. *Pleading — denials on information and belief.* The allegations of a petition on mandamus are not put in issue by denials made upon information and belief. *Matter of Elder v. Bingham*, 25.

2. *Municipal corporations — judgment by police commissioner on trial had before predecessor.* The action of a police commissioner in dismissing an officer is invalid if based upon proceedings had before his predecessor and not resulting in a final judgment.

Absence of an officer from duty when caused by act of God, as by illness, is not ground for dismissal under section 303 of the charter of Greater New York. To deprive an officer of his position, the absence must have been voluntary and intentional. *Id.*

3. *Same — when mandamus proper remedy for reinstatement.* When no trial has been had before the police commissioner on the discharge of an officer, the latter's remedy for reinstatement is by mandamus. *Id.*

Petition to obtain recount of votes must state particular district in which ballots were improperly counted.

See ELECTION LAW.

Action by assistant foreman of highways for reinstatement.

See MUNICIPAL CORPORATION, 2.

Defect in writ of mandamus available until made peremptory.

See MUNICIPAL CORPORATION, 3.

**MANSLAUGHTER.**

Defendant may show reputation for peaceable disposition.

See CRIME, 5, 6.

**MASTER AND SERVANT.**

Action upon alleged promise of decedent to make legacy in consideration of services.

See CONTRACT, 3.

When receipt by laborer in street department precludes recovery of extra compensation as foreman.

See MUNICIPAL CORPORATION, 1.

Injury to employee through blasting.

See NEGLIGENCE, 5.

When master excused at common law for negligence of foreman.

See NEGLIGENCE, 7.

Explosion of dynamite on railroad — liability of master, although negligence of fellow-servant contributes to injury.

See NEGLIGENCE, 8.

Injury to motorman by collision of street cars — failure of company to post notice of change in schedule.

See NEGLIGENCE, 9.

**MASTER AND SERVANT — Continued**

Benefits of Employers' Liability Act are available to superintendent — injury on freight elevator — assumption of risk.

*See NEGLIGENCE, 11, 12.*

What constitutes employment as foreman — injury to employee removing ashes from locomotive.

*See NEGLIGENCE, 15, 16.*

Injury to servant by fall of chute.

*See NEGLIGENCE, 18.*

Injury to conductor by derailment of rear car — erroneous nonsuit where shifting of switch is possible cause.

*See NEGLIGENCE, 21.*

Injury by breaking of plank upon horses — when structure not a scaffold under the Labor Law — when relationship of master and servant is for jury.

*See NEGLIGENCE, 23.*

**MECHANIC'S LIEN.**

*See LIEN, generally.*

**MEMBERSHIP CORPORATION.**

Bequest to McAuley Mission subject to transfer tax.

*See TAX, 1, 2.*

**MISNOMER.**

Party with different names may be sued without alias — estoppel.

*See DEBTOR AND CREDITOR, 2, 8.*

**MISTAKE.**

Purchase of lands from devisee with knowledge that child was born after making of will is not a mistake of fact.

*See PAYMENT.*

**MONEY RECEIVED.**

Action to recover money paid on purchase of land from devisee — mistake of act.

*See PAYMENT.*

Veindee cannot recover money paid to agent because of a second payment to principal.

*See PRINCIPAL AND AGENT, 9.*

When over-payment made to messengers on forged bills may be recovered from principal.

*See PRINCIPAL AND AGENT, 10, 11.*

**MORTGAGE.**

Inconsistent findings that mortgage was taken in good faith and that mortgagors had knowledge that plaintiff claimed a lien.

*See APPEAL, 4.*

When award upon condemnation of lands by city chargeable with a deficiency judgment on foreclosure.

*See EMINENT DOMAIN, 1.*

Failure of assignee to allege assignment of bond on foreclosure.

*See PLEADING, 1.*

Action to have deed declared to be a mortgage — agreement by parties.

*See REAL PROPERTY, 12.*

**MOTION AND ORDER.**

Appeal from judgment on demurrer brings up the propriety of order on which it is founded.

*See APPEAL, 1.*

Motion to set aside judgment erroneously entered upon report of a referee — how governed.

*See ATTORNEY AND CLIENT, 3.*

**MOTION AND ORDER** — *Continued.*

When moving affidavit for examination before trial sufficient — reference to unverified complaint.

*See* DEPOSITION, 5-7.

When mechanic's lien may not be canceled by order.

*See* LIEN, 1.

Motion for bill of particulars may not be united with motion to make complaint more definite and certain.

*See* PLEADING, 19.

Motion to vacate order appointing receiver in foreclosure resettled to show moving parties.

*See* PRACTICE, 9.

**MOTOR VEHICLE LAW.**

Collision between motor car and vehicle — law of the road.

*See* NEGLIGENCE, 14.

**MUNICIPAL CORPORATION.**

1. *When laborer in street department not entitled to recover wages as foreman.* Action to recover additional compensation for services alleged to have been rendered by the plaintiff to a municipal corporation as foreman in the street cleaning department.

It appeared that the plaintiff was employed as a laborer in the street cleaning department at a wage of one dollar and fifty cents per day; that being unable to do hard manual labor by reason of his age, he was at certain times on his own solicitation allowed to act as foreman in charge of a certain number of laborers. The plaintiff was never appointed as foreman nor given a foreman's badge and performed his duties under the instructions of regularly appointed foremen. It further appeared that without protest or complaint he gave receipts in full payment for services as laborer during the entire time he was employed. On all the evidence,

*Held*, that the plaintiff was not entitled to recover any sum in addition to laborer's wages received, for to hold otherwise would establish a dangerous precedent in that any municipal employee performing the duties of a higher rank for a day or week might claim additional compensation no matter what the agreement with the corporation;

That the plaintiff by accepting and receipting for his wages without protest had waived his right, if any, to increased wages. *Farrell v. City of Buffalo*, 597.

2. *Mandamus by assistant foreman of highways asking reinstatement — fact that relator, a volunteer fireman, was protected from removal must be alleged.* An assistant foreman of highways in the borough of Queens is subject to removal under section 1543 of the revised charter of the city of New York.

Even if such assistant foreman claims protection from removal without trial under section 21 of the Civil Service Law (as amended), on the theory that he was a member of the volunteer fire department of the city, he must allege that fact in his alternative writ of mandamus seeking reinstatement; otherwise the peremptory writ reinstating him cannot issue.

Such fact is not alleged by including in the writ the letter of the relator's attorney stating that there was no question in his mind but that the relator, being a veteran fireman, was entitled to reinstatement, this being a mere opinion, not an allegation of fact. *People ex rel. Fogarty v. Cassidy*, 698.

3. *Sams — practice — defect in writ.* A defect in substance in the writ of mandamus may be taken advantage of at any time before the peremptory writ is awarded, and even after the trial of the issue on the alternative writ. *Id.*

4. *Contract for improvement of hospitals in city of New York — bid in excess of appropriation not validated by subsequent additional appropriation.* Under the provisions of the charter of Greater New York the Trustees of Bellevue and Allied Hospitals are without power to award a contract for additional buildings when all the bids are in excess of the amount appropriated therefor. Under such circumstances the board should reject the bids.

The fact that the trustees upon opening the bids announced the lowest bidder is not effective as an award of the contract either in law or in fact, nor does it give to the lowest bidder any right to compel the execution of a contract.

**MUNICIPAL CORPORATION** — *Continued.*

Nor does the action of said trustees resolving that the lowest bid be accepted subject to the approval of the board of estimate and apportionment and the board of aldermen of a request for an additional appropriation confer any rights upon the bidder. Such act of the trustees is *ultra vires*, they being without power to validate a bid in excess of the amount previously appropriated.

Such bid being invalid when made, cannot be given validity by any subsequent action by the trustees of the hospitals or by any other municipal board. Thus, a subsequent appropriation made by the board of estimate and apportionment and by the board of aldermen does not inure to the benefit of the prior bidder. *Williams v. City of New York*, 756.

Damages upon condemnation of property by municipalities.

*See* EMINENT DOMAIN, 1, 2, 7-11.

Dismissal of policeman by commissioner upon proceedings had before his predecessor — insufficient grounds for dismissal.

*See* MANDAMUS, 2.

Cemetery association not liable for assessment for street opening — when abutting owner entitled to damage for easements.

*See* TAX, 3, 4.

**NEGLIGENCE.**

1. *Injury to passenger by sudden starting of car — facts not showing negligence — evidence* The plaintiff's wife in company with her son and daughter boarded an open car having running boards on the side. It appeared that the car was stopped at the signal of another passenger and that the son alighted but that the mother merely arose in her place and did not attempt to leave the car, when the sudden starting thereof threw her to the street. It also appeared that neither the daughter nor the mother caught the eye of the conductor although they endeavored to signal him to stop.

*Held*, that the evidence was insufficient to establish negligence on the part of the conductor in signaling the car to start, for he was justified in believing that the plaintiff's wife did not intend to alight. *Keenan v. Metropolitan Street Railway Co.*, 56.

2. *Pleading — damage — loss of wife's services.* When the plaintiff alleged only that he lost his wife's services as "housekeeper in my dwelling," he is not entitled to show that she assisted him in his occupation as janitor of adjoining houses, nor is he entitled to show that her illness necessitated the services of his daughters who had previously been earning money which they contributed to the family. *Id.*

3. *Trial — improper comment by attorney.* When the defendant's counsel on cross-examination interrogates a witness concerning a discrepancy between her testimony and the complaint filed by her in another action, it is improper for the plaintiff's attorney to state before the jury that he was responsible for the prior complaint which had been withdrawn. So too, it is improper for the plaintiff's attorney to go beyond the evidence and state that the defendant "has millions of capital" and "thousands of employees," etc. *Id.*

4. *Child injured by street car — failure to look — erroneous charge.* In an action for injuries received by a child who, while crossing the street, was struck by a car, there was no evidence that he looked in either direction and it appeared that the car was moving slowly. On the question of failure to look the court charged in substance that there is "no hard and fast rule that requires a person to look up and down the track when about to cross the track of a street surface railroad. If the car at the time a person undertakes to cross is sufficiently far away that a person in the exercise of ordinary care may get across in safety then the failure to look is not evidence of negligence. In a crowded city like this if every person waited for a car to stop and slow up before they got across the street, they would be a good while in getting across."

*Held*, that, considering the facts, the charge was error and required a reversal. *Peterson v. Interurban Street Railway Co.*, 210.

5. *Injury to employee through blasting.* When a servant is injured by a blast through the alleged negligence of the master, and the complaint alleges his negligence and that of his agents or servants and the failure to make and enforce proper rules, the plaintiff should be compelled to furnish a bill of particulars

**NEGLIGENCE** — *Continued.*

stating whether the blasting was under the personal charge of the defendant at the time of the accident, or in charge of an employee, with his name or a description of him and his duties, and in what negligent manner the blast was fired, or from what negligent cause, and what rules should have been made or what existing rule was disregarded. *Dwyer v. Slattery*, 345.

6. *Common-law rules obtain unless action brought under Employers' Liability Act.* An employee in order to obtain the privileges of the Employers' Liability Act must bring his action thereunder. If he sue at common law, the common-law rules are applicable. *Curran v. Manhattan Railway Co.*, 347.

7. *Same — erroneous charge as to neglect of foreman employed to give warning.* Hence, when in a common-law action it is shown that the master employed a foreman to warn laborers working upon a railroad track of the approach of trains, and that the plaintiff, an employee, was injured during a temporary absence of the foreman, it is error to charge that the foreman was the *alter ego* of the master and that his neglect was that of the master and not that of a fellow-servant, when no question is raised as to the competency of the foreman.

By furnishing a competent foreman to give warning, the master performed his duty and was not liable for the negligent acts of the foreman in the management and detail of his work.

*Ward v. Manhattan Railway Co.* (95 App. Div. 487), limited. *Id.*

8. *Explosion of dynamite carried on railroad — master liable for negligence although negligence of fellow-servant contributes to injury.* When an injury to a servant is caused partly by the negligence of a fellow-servant and partly by that of the master, the negligence of the fellow-servant does not excuse the master.

When it appears that the plaintiff, a brakeman, was injured by an explosion of dynamite resulting from a rear end collision, and that the car in which the dynamite was stored was next to the caboose of the forward train and was not provided with air brakes, as were the majority of the other cars, contrary to the rule of the railroad requiring that cars carrying explosives be first class in every respect and that they be placed as near the middle of the train as possible, the jury would be entitled to find that the master, by storing the dynamite in a car not equipped with air brakes, made it impossible for the decedent's fellow-servants to place the car in the middle of the train, and a nonsuit based on the ground that the injury was caused by the act of a fellow-servant is error. *Kelly v. Delaware, Lackawanna & Western R. R. Co.*, 432.

9. *Injury to motorman by collision — failure of master to conform to rules.* The plaintiff was a motorman on the electric railroad of the defendant and was injured by a head-on collision at night. Usually the defendant operated two tracks, but at the time of the accident a portion of one of the tracks was torn up for repairs, and cars passing in both directions were required to use one track for a short distance. The rules of the defendant required the motorman and conductor to follow the time tables as posted, and stated that they would receive notice of temporary changes in the time tables by notice posted the day before they became effective. The rules also required the motorman to obey the instructions of the conductor. The time tables as posted required the run to be made in one hour, but through his conductor the plaintiff had been instructed to make the run in forty-five minutes during certain hours of the night, which schedule was never embodied in the time tables or notice thereof posted. The plaintiff, while running on the forty-five-minute schedule as directed, came into collision with a work car coming from the opposite direction upon the part of the road where a single track was used. The operators of the work car testified that they had no notice of the change in schedule. On an appeal from a nonsuit,

*Held*, that as the conductor and the plaintiff had been instructed to run on the forty-five-minute schedule, the jury would have been entitled to find that the master was responsible for the change in the schedule time;

That when only one track became available for use by cars moving in both directions it became the duty of the defendant to use reasonable precaution to protect its employees commensurate with the unwonted danger;

That the jury would have been entitled to find that by changing the schedule time, without giving notice thereof to employees, the defendant had violated its own rules, and was liable.

**NEGLIGENCE — Continued.**

That although the headlight of the car had gone out, and the plaintiff, unable to fix it, had hung a red lantern in its place, he was not guilty of contributory negligence in failing to notify the conductor thereof. *Baldwin v. Schenectady Railway Co.*, 441.

10. *Injury at railroad crossing — inconsistencies between testimony on first and second trial.* When a judgment in favor of the plaintiff, who was injured while crossing a railroad track was reversed upon the ground that on his own testimony he was guilty of contributory negligence in failing to look, and on the new trial he directly contradicts his former testimony on that point without explaining the contradiction and without corroboration, there is such an irreconcilable variance between the two statements that the plaintiff fails to sustain the burden of proof. *Fisher v. Central Vermont Railway Co.*, 446.

11. *Employers' Liability Act — injury on elevator.* The superintendent of a mill, although the *alter ego* of the owner, is entitled to the benefits of the Employers' Liability Act, which makes no distinction between different classes of employees. *Aken v. Barnet & Aufesser Knitting Co.*, 463.

12. *Same — trial — questions for the jury.* Although the master has posted a notice forbidding employees from riding on a freight elevator, it is for the jury to say whether the defendant acquiesces in such use when there is evidence that the employees were accustomed to use it to the knowledge of the master, and a dismissal of the complaint of a superintendent who was injured on such elevator, is error.

As section 8 of the Employers' Liability Act provides that the question whether an employee assumes the risk of injury or is guilty of contributory negligence by the continuance in his employment with knowledge of the risk is a question of fact, it is error to dismiss the complaint of one injured on the freight elevator upon the ground that being near a landing when the elevator stopped, he could have stepped to the floor and attempted to operate it from a place of safety. *Id.*

13. *Measure of damages for injury to horse and wagon by collision.* When in an action to recover damages to a horse and wagon received in a collision with an automobile, it appears that the actual expense of repairing the wagon was twenty-seven dollars and fifteen cents, and that it was in as good or better condition than formerly, testimony that the wagon had shrunk in value from two hundred dollars to fifty dollars is purely fanciful and not worthy of consideration as a basis of damage.

Nor can the damage to the horse be based upon its shrinkage in value as a "family horse" by reason of its becoming nervous in the neighborhood of automobiles by reason of the accident. The defendant is not required to pay the difference in the value of the horse before and after the accident treating it only as a "family horse." *Mendleson v. Van Rensselaer*, 516.

14. *Same — collision between motor car and vehicle — law of the road.* It appeared that the plaintiffs were driving their wagon and approaching the intersection of another road into which they intended to turn. On nearing the intersection they failed to keep to the right thereof as required by subdivision C of section 157 of the Highway Law, but turned to the left side of the road. The defendant, coming from behind, in attempting to pass to the left of the plaintiffs, as required by subdivision B of said act and subdivision 1 of section 4 of the Motor Vehicle Law, struck and injured the horse and wagon. On the question of the defendant's liability,

*Held*, that the questions as to whether the defendant gave sufficient warning and properly managed his machine in attempting to pass the plaintiffs when nearing the point of intersection of the roads, as well as the contributory negligence of the plaintiffs, were not questions of law but of fact proper for the jury. *Id.*

15. *Superintendent under Employers' Liability Act.* A person placed in charge of employees cleaning ashes from locomotives in the absence of the regular superintendent or foreman, and directing the work, is acting as a superintendent within the meaning of the Employers' Liability Act. *Mikos v. New York Central & Hudson River R. R. Co.*, 536.

16. *Same — injury to employee removing ashes from locomotive.* In an action to recover for the death of the plaintiff's intestate it appeared that the intestate was employed by the defendant to clean ashes from locomotives in an ash pit

**NEGLIGENCE** — *Continued.*

over which the locomotives were run for that purpose. While so engaged, an employee known as a "hostler," without other warning than ringing the bell, started two locomotives under which the intestate was working, whereby the intestate was run over and killed. There was evidence that the "hostler" had been directed by the acting superintendent to take the locomotives from the pit as soon as possible, and was told that they were dumped and ready to be removed.

*Held*, that the "hostler" was justified in relying on the statement of the superintendent that the locomotives were ready to be moved, and that the defendant could not be heard to say that its orders should be disregarded or its information treated as unreliable, and that a verdict for the plaintiff was warranted. *Id.*

17. *Collision between vehicle and trolley car coming from behind — contributory negligence.* Action to recover for personal injuries.

The plaintiff was driving a load of hay, the wheels of his vehicle running on the right-hand track of the defendant's electric road. A trolley car coming from behind sounded its bell when 500 feet distant from the plaintiff as a warning to leave the track. The plaintiff turned his team to the left so that the car could pass him, but, upon the car slowing up, immediately turned to the right for the purpose of crossing the track when he was struck and injured. It was shown that the motorman used every endeavor to stop the car after the plaintiff made the second turn and that the plaintiff had not looked behind from the time when he first saw the car 500 feet away.

*Held*, that it was error to refuse to charge that if the plaintiff drove so as to be free from the car and then turned toward the track without any precaution, he was negligent and could not recover. *Robinson v. Crosstown Street Railway Co.*, 543.

18. *Injury by fall of chute.* A master maintaining a chute used to slide merchandise from one floor to another is bound to so secure it that it will not fall, which duty cannot be delegated so as to relieve the master from liability for injuries so caused. *Ambellan v. Barcalo Manufacturing Co.*, 547.

19. *Release of action procured by fraud — charge construed.* When it is a question as to whether a release signed by the plaintiff was obtained by misrepresentation of the master and was signed by the plaintiff without knowing its contents, and when the court has charged that if when the plaintiff signed he knew and understood the language of the instrument that he could not recover, a subsequent refusal to charge that if the plaintiff "knowingly" executed the release he cannot recover, must be construed to mean that the court refused to charge that the plaintiff could not recover if he knew he signed the paper, that interpretation being necessary in view of the prior charge. *Id.*

20. *Same — appeal — failure of plaintiff to tender consideration for release not available on appeal.* Although the effect of such release may not be avoided without repaying or tendering the consideration, the objection cannot be taken for the first time upon appeal. *Id.*

21. *Injury by shifting railway switch — erroneous nonsuit.* In an action by the conductor of a railroad to recover damages for injuries received, it appeared that the locomotive and first cars of the train on passing over a switch took a track bearing to the left, while the rear truck of one car and the remaining cars took the track bearing to the right. It appeared that the switch in question was controlled from a tower house, and the system had been installed within a few hours of the happening of the accident. It was shown that there was no bumping of the wheels on the ties as if they had left the track, nor were there any marks or scratches on the switch points or car wheels. The cars and rear truck were free from defects which might have caused the accident.

*Held*, that a nonsuit was error:

That on the evidence the jury would have been justified in finding that the accident was caused by the improper shifting of the switch by the towerman during the passage of the train, or that the switch was defective. *France v. New York Central & Hudson River R. R. Co.*, 550.

22. *Injury by sudden starting of train while passenger alighting.* The plaintiff, a woman unused to travel, was riding on the defendant's train. As the train approached the station where she intended to alight the trainman opened the



**NEGLIGENCE — Continued.**

door and called out the station and said, "All change," and thereupon went into the car ahead. The train actually stopped about 150 feet from the station platform, and the plaintiff believing that she had arrived at the station, and while in the act of alighting, was thrown and injured by the sudden starting of the train.

*Held*, that the questions of the defendant's negligence and the absence of contributory negligence of the plaintiff were properly submitted to the jury;

That the act of the trainman in calling out the station when he knew that the train had not arrived at the platform, and that it was not time for passengers to alight, was negligent;

That although the plaintiff was inexperienced in traveling and unacquainted with railroads, she was not, as a matter of law, guilty of contributory negligence in traveling alone. *Wolford v. New York Central & Hudson River R. R. Co.*, 553.

**23. Injury by breaking of plank used as scaffold — when structure not within section 18 of the Labor Law — question as to whether relation of master and servant exists is for jury.** When a plaintiff being employed by one master is injured while at work as a carpenter in the building of the defendant by the breaking of a scaffold, the question as to whether the relation of master and servant existed between plaintiff and defendant is for the jury and not for the court.

A structure consisting of a plank laid across two wooden horses ten feet high and moved about by workmen at their convenience is not a scaffold within the meaning of section 18 of the Labor Law.

When it is shown that the plank which broke was within the control of the plaintiff and his fellow-workmen and was placed and continually readjusted by them, and that there were many other planks on the premises which they could have used, the defendant is not liable. *Williams v. First National Bank*, 555.

**24. Excessive verdict — failure to show that injuries resulted from accident.** When in an action to recover for personal injuries, the verdict is based on a condition of hysteria in the plaintiff, and it appears that shortly prior to the accident she underwent a surgical operation which might have produced the hysteria and the only other injuries shown were trifling, the plaintiff has failed to sustain the burden of showing that the hysteria was the result of the accident, and a new trial will be granted unless the plaintiff reduce the judgment. *Des Moines v. New York City R. Co.*, 843.

**Right of way — pedestrian struck by street car between intersecting streets.**

*Fitzgerald v. Brooklyn Heights Railroad Co.*, 893.

**Improper questions to show that defendant is insured.**

*Cobb v. United Engineering & Contracting Co.*, 904.

**Verdict for personal injuries cannot be based upon plaintiff's earnings in criminal employment.**

*See DAMAGES*, 1.

**Complaint against officer of insurance corporation for damages for negligence.**

*See PLEADING*, 20.

**Liability of railroad company for injury from failure to repair pavement adjoining tracks.**

*See RAILROAD*, 2.

**Erroneous charge as to presumption from failure of defendant to produce passengers who witnessed street car accident.**

*See TRIAL*, 2.

**NEGOTIABLE INSTRUMENTS LAW.**

**Liability of irregular indorser.**

*See BILLS AND NOTES*.

**NEW TRIAL.**

*See TRIAL*.

**NEW YORK, CITY OF.**

**Condemnation of lands by the city.**

*See EMINENT DOMAIN*, 1, 2, 7-11.

**Dismissal of policeman by commissioner upon proceedings had before his predecessor — insufficient grounds for dismissal.**

*See MANDAMUS*, 2.

**NEW YORK, CITY OF — Continued.**

Mandamus by assistant foreman of highways for reinstatement.

See MUNICIPAL CORPORATION, 2.

*Ultra vires* award of contract for improvement of hospitals — bid in excess of appropriation.

See MUNICIPAL CORPORATION, 4.

Cemetery association not liable for assessment for street opening — when abutting owner entitled to damage for easements — charter construed.

See TAX, 3, 4.

**NON-RESIDENT.**

When property of non-resident held in trust subject to tax.

See TAX, 5.

**NOTICE.**

Bailee who after notice waives right to sell pledged stock cannot recall such waiver without second notice.

See BAILMENT.

When notice of election of insurance directors insufficient to estop policy-holders.

See INSURANCE, 5.

**NOVATION.**

Acceptance by corporation of obligation of third person in settlement of claim against its president bars action against him for conversion.

See CONVERSION, 2.

Assumption by corporation of contract to buy lands.

See DEBTOR AND CREDITOR, 9.

**NUISANCE.**

House of abortion is public nuisance.

See CRIME, 17.

**OFFICER.**

*Ultra vires* action of municipal board in awarding contract in excess of appropriation.

See MUNICIPAL CORPORATION, 4.

Validity of election of *de facto* officer immaterial in action to recover money received.

See PLEADING, 14.

**PARENT AND CHILD.**

*Husband and wife — conflict of laws — when foreign statute legitimatizing children on marriage of parents binding here.* The statute of a sister State providing that where the parents of an illegitimate child intermarry, or if the father acknowledge the child as his by a written instrument, it shall be considered legitimate for all intents and purposes, is binding here and entitles a child so legitimatized to share in real estate with other legitimate children by a former wife, even though the second marriage of the father was made following a foreign divorce procured by him by publication, the validity of which would not be recognized by our courts.

Although, under the decisions of the Supreme Court of the United States, our courts can under certain circumstances refuse to recognize the validity of a foreign divorce, the rule should not be so extended as to refuse recognition of the legitimacy of children of a subsequent marriage who are legitimate where born or subsequently domiciled. *Olmsted v. Olmsted*, 69.

**PARTITION.**

*When partition agreement will be enforced in equity.* When parties have entered into an agreement, partly written and partly oral, settling a dispute and providing for the partition of lands and both parties have acted under the agreement and acquiesced in a partition made by an arbitrator and have remained in possession ever since, equity will enforce the agreement and compel the execution of the conveyances necessary to vest each party with the property awarded to him. *Jones v. Jones*, 148.

Will not lie during life estate.

See WILL, 6.

**PARTNERSHIP.**

1. *Will — legatees not liable as partners when representative continues business as authorized.* Beneficiaries who consent that an administrator with the will annexed continue the testator's business as directed by the will are not partners nor individually liable to one who deals with the administrator with knowledge of his representative capacity.

An executor authorized to continue the testator's business is not entitled to involve the general assets of the estate, and persons dealing with him are bound to know that they can resort only to the property embarked in the business. They have no recourse to the general assets of the estate, nor can they look to the beneficiaries individually. The rule holds although, with the consent of the beneficiaries, the administrator continues the business for a year beyond the time set by the will.

Under such circumstances the beneficiaries are not individually liable because the property has been transferred to them and by them to a corporation of which they are stockholders. *Manhattan Oil Co. v. Gill*, 17.

2. *Action for accounting — when appointment of receiver and injunction against carrying on business unauthorized.* There is no authority for the appointment of a receiver of partnership property unless the partnership is terminated, or there has been a breach of the agreement or other cause justifying a dissolution. During the partnership the business must be conducted by the partners and cannot be taken out of their hands unless facts be shown justifying a dissolution and a sale of the property.

Hence, in an action by a partner to obtain an accounting by his copartner under the partnership agreement a receiver of the property cannot be appointed where neither a dissolution nor sale of property is asked.

Moreover, when under such circumstances a partner moves for the appointment of a receiver and there is nothing to show that the defendant has done, threatens or is about to do any act which will injure the plaintiff or render a judgment ineffectual or depreciate the value of the partnership property during the action, there are no grounds for an injunction restraining the defendant from carrying on the partnership business. *Greenwald v. Gotham-Attucks Music Co.*, 29.

When examination before trial allowed in order to show partnership.

See DEPOSITION, 1.

Liability of partner who is appointed executor for the indebtedness of his firm to the estate — effect of revocation of letters.

See EXECUTOR AND ADMINISTRATOR, 14, 15.

**PARTY.**

*When plaintiff may amend to bring in additional defendants jointly liable.* In an action at law for a money judgment where a party elects to sue one only of parties jointly liable on a contract and the defendant demurs to the complaint upon the ground that the other parties liable have not been joined, the court has power to allow an amendment bringing in the other parties if the plaintiff show an adequate excuse for not joining them and the defendants will not be prejudiced especially when the plaintiff might not be entitled to sue the original defendant alone.

*Query*, as to whether other parties may be brought in when the action is in tort. *Haskell v. Moran*, 810.

Liquidating agent of national bank may be sued in State court for accounting.

See BANKING, 3.

Only party to sealed instrument may sue thereon.

See CONTRACT, 5, 6.

Action by assignees of obligee against obligor — erroneous judgment for assignee who was made a codefendant.

See CONTRACT, 7.

Necessary parties in judgment creditor's action to establish a lien upon property after two assignments.

See DEBTOR AND CREDITOR, 3.

Suit in equity by creditor against stockholders for unpaid subscriptions — defaulting subscribers not necessary parties.

See DEBTOR AND CREDITOR, 6, 7.

**PARTY — Continued.**

When trustee not necessary party in judgment creditor's action.

*See* DEBTOR AND CREDITOR, 14.

Necessity in judgment creditor's action to permit other creditors to become parties.

*See* DEBTOR AND CREDITOR, 18.

Commission upon interrogatories may issue to examine a party.

*See* DEPOSITION, 3.

Right of policyholder to contest election of directors in insurance corporations.

*See* INSURANCE, 4.

Motion resettled to show moving parties.

*See* PRACTICE, 9.

When widow of spendthrift may contest validity of trust deed executed by him for his own benefit — necessary parties.

*See* TRUST, 3.

**PAYMENT.**

*When moneys not paid under mistake of fact — conveyance by devisee when child born after making of will.* The lack of authority of a sole devisee to convey lands when a child was born to the testator after the making of the will is not a question of fact, but one of law, and one who has taken title and paid a subsequent mortgage on lands conveyed under such circumstances cannot recover on the theory that the payment was made under a mistake of fact, where there is neither testimony nor finding that the plaintiffs were ignorant or mistaken respecting any of the facts involved.

The deed of the widow was not invalid, being effective to convey her dower right, and moreover, as the widow's action for dower was not barred, the person paying the mortgage was subrogated to the equitable rights of the mortgagee.

The cases in which moneys paid may be recovered may be grouped under three heads: (1) When payments are induced by fraudulent misrepresentation; (2) when made under coercion either in fact or in law; (3) when made under a mistake of fact. *Belloff v. Dime Savings Bank*, 20.

Indorser of note not discharged when payment by maker is an unlawful preference.

*See* BANKRUPTCY, 5, 6.

When unpaid promissory notes given for premiums do not constitute payment.

*See* INSURANCE, 1.

When receipt by laborer in street department precludes recovery of extra compensation as foreman.

*See* MUNICIPAL CORPORATION, 1.

Vendee cannot recover money paid to agent because of a second payment to the principal.

*See* PRINCIPAL AND AGENT, 9.

When over-payments made to messengers on forged bills may be recovered from the principal.

*See* PRINCIPAL AND AGENT, 10, 11.

When promissory note constitutes payment — right of third person to rely upon receipt given therefor.

*See* SALE, 5.

**PENAL CODE.**

[For table containing all sections cited and construed in this volume, *see ante*, p. xlv.]

**PENALTY AND FORFEITURE.**

Action for penalty upon refusal of transfer on street railroad.

*See* RAILROAD, 1, 3, 6.

**PERSONAL PROPERTY.**

Gift of.

*See* GIFT.

Contracts for the sale of.

*See* SALE, generally.

**PLEADING.**

1. *Foreclosure—failure to allege assignment of bond is fatal.* A complaint in foreclosure by the assignee of a mortgage which merely alleges the assignment of the mortgage but is silent as to an assignment of the bond is subject to demurrer as frivolous, as the mortgage is a mere incident to the debt and an assignment thereof does not pass the debt. *Smith v. Thompson*, 6.

2. *Amendment of pleading to state true name of defendant corporation—payment of costs required.* The plaintiff brought an action to recover for death by negligence, naming the defendant as the "Terry and Tench Construction Company." On a motion to amend the summons and complaint by striking out the word "construction" it appeared that the real name of the defendant which had employed the decedent was the "Terry and Tench Company," a domestic corporation, which occupied the same office and continued the same line of business and had the same officers and stockholders as a company called the "Terry and Tench Construction Company," which had become financially embarrassed and gone into the hands of a receiver. It also appeared that the vice-president of the corporation served was the vice-president of both corporations.

*Held*, that under the circumstances an amendment of the summons and complaint so as to designate the real defendant should be allowed;

That the defendant having answered and having notice which corporation was intended to be sued was not prejudiced by the amendment which should be granted in furtherance of justice;

That under the facts disclosed the case was not brought within the rule that defendants cannot be substituted by amendment;

That as the plaintiff's error was not based upon any erroneous information given by the defendant prior to the commencement of the action the amendment should be conditioned upon the payment of costs. *Ward v. Terry & Tench Construction Co.*, 80.

3. *Bill of particulars—not granted before answer.* A motion by a defendant for a bill of particulars before answer will be denied, even though it be necessary for his defense. *Standard Materials Co. v. Bowns & Sons Co.*, 91.

4. *When amendment at former trial available on new trial.* When on a former trial the complaint is amended to conform to the proof by a formal amendment set out in the record changing the date of the execution of a contract, but no formal order is entered and no amended complaint is served, the plaintiff is entitled on another trial to have the benefit of the former amendment, although the record does not show that it was allowed to conform the complaint to the proof. *Stannard v. Reid & Co.*, 304.

5. *Bill of particulars granted.* The granting of a bill of particulars does not depend upon the actual facts or the knowledge of the opposite party concerning them, but is dependent upon the facts claimed to exist. The purpose of a bill of particulars is to amplify the pleading and to indicate more particularly the nature of the claim in order that surprise at trial may be avoided. *Dwyer v. Slattery*, 345.

6. *Action against directors of corporation for accounting—failure to allege that defendants were directors.* A complaint in a stockholder's action alleging in substance that the defendants knowing the value of property sold to a corporation conspired to defraud the stockholders and in pursuance of the conspiracy obtained control of the majority of the stock by false representations, etc., which fails to allege that the defendants were the directors of the corporation, fails to state a cause of action against them, for by the statute directors only have power to manage the corporate affairs. *Brown v. Utopia Land Co.* (No. 2), 364.

7. *Same—failure to excuse demand that corporation sue.* Such complaint is also subject to demurrer when it fails to allege that a demand has been made upon the corporation to bring action to recover for the wrongful acts complained of, or fails to state facts which excuse such demand. *Id.*

8. *Same—misjoinder of actions.* Moreover, the plaintiff cannot in one complaint unite an action by him as a stockholder to compel an accounting by the directors for their official acts and a restitution to the corporation of moneys wrongfully received, with a personal action to recover damages sustained by the wrongful acts of the defendants. *Id.*

**PLEADING — Continued.**

9. *Trial — improper dismissal on merits.* In sustaining a demurrer the complaint should not be dismissed on the merits, unless by no possibility can the pleading be made good by amendment. *Id.*

10. *Allegation that various transactions were done pursuant to scheme to defraud creditors — equity.* A series of acts involving different conveyances and fraudulent judgments made to different parties, at different times, can properly be the subject of one bill in equity by creditors to reach the property, provided it be alleged that the acts were done pursuant to a single and forbidden scheme.

A complaint which sets out that such transactions were made without consideration and with a continuing intent to cheat and defraud creditors is not subject to demurrer. *Wright v. Simon*, 774.

11. *Complaint stating action for conversion — counterclaim on contract demurrable.* A complaint which alleges the title to personal property in the plaintiff under a promise by the defendant to deliver it upon demand, that demand was made and refused, states an action for conversion and a counterclaim thereto founded upon contract is subject to demurrer. *McIntyre v. Smathers*, 776.

12. *Action at law against president of a corporation to recover corporate moneys expended for political purposes and upon improvident contracts.* The complaint in an action at law against the president of an insurance corporation having general superintendence of the affairs and officers of the company and empowered to establish rules and regulations for the business, which alleges that the defendant "made or authorized to be made or knowingly or negligently permitted to be made" unauthorized and unlawful payments of specific amounts of the funds of the corporation for political purposes and negligently failed to establish rules to prevent such payments, etc., is sufficiently definite and certain even though it be not expressly alleged whether the defendant authorized or personally participated in the payments or whether they were made by others through his neglect to properly supervise the affairs of the company and perform the duties of his office. This, because in either event the defendant would be liable, and in such cases allegations in the alternative are permissible and the plaintiff is not required to elect in advance and stake the result of the issue on an ability to prove to the satisfaction of the jury the one alternative to the exclusion of the other. *Mutual Life Ins. Co. v. McCurdy*, (No. 1) 815.

13. *Same — when payment does not give rise to separate cause of action.* Allegations that political contributions aggregating a certain sum were made at various times unknown to the plaintiff in pursuance of a single scheme and policy to deplete the funds of the company states a single cause of action. Each separate payment does not give rise to a distinct action which must be separately stated and numbered. This, because the defendant held the position of president and trustee continuously during the period, and the action is founded upon his breach of official duty and for general unliquidated damage caused thereby. *Id.*

14. *Same — validity of election of president immaterial.* In such action it is immaterial whether the defendant's election as president were valid so long as he was suffered to exercise the official duties by the acquiescence of the company so as to become a *de facto* officer and chargeable with the responsibilities of the positions occupied. *Id.*

15. *Same — allegations considered.* An allegation that the defendant "directly or negligently" permitted certain officers, trustees and employees of the corporation to establish and maintain a "confidential fund" of the company and to expend and disburse the same for unauthorized and unlawful purposes, states but a single cause of action which is sufficiently definite.

Allegations that the defendant "knowingly or negligently" made unauthorized and improvident agency contracts with a member of his family, and paid thereunder grossly excessive commissions, and "knowingly or negligently" permitted payments of a sum stated not embraced in the agency contracts or authorized to be made, etc., state a cause of action for general damage sustained by unauthorized payments.

Allegations that the defendant induced his corporation to create the office of superintendent of the foreign department to enable him to appoint his son thereto, and "that having thereupon made or authorized or knowingly or negligently permitted the making of" a pretended contract between the plaintiff and

**PLEADING — Continued.**

defendant's son at exorbitant rates of commission, etc., states a single cause of action with sufficient definiteness. *Id.*

16. *Suit in equity for accounting against president of insurance corporation — general accounting for all items received.* In a suit in equity brought by an insurance corporation against its former president to require him to account for expenditures and disbursements "made, or caused or knowingly permitted to be made, by him or his agents and servants" from moneys received by him in his fiduciary capacity and taken from the treasury through a system of false and fraudulent bills and vouchers, etc., and for unauthorized and unlawful purposes, as to the details of which transactions the plaintiff is without knowledge or information, or means of obtaining knowledge or information, the plaintiff is not required to set forth the details with a precision rendered impossible owing to the misconduct of the defendant in falsifying the records. Even though not distinctly a trustee, such allegations empower a court of equity to require the president of a corporation to account for the corporate property.

Each sum of money or item of property which came into the hands of the defendant in his official capacity does not give rise to a separate cause of action, and the complaint will not be required to be divided into as many separate actions as there are items of property claimed to have been received.

An officer of a corporation who exercised his functions continuously may be required to account in equity for moneys received under a single count. *Mutual Life Ins. Co. v. McCurdy* (No. 2), 822.

17. *Action against president of corporation to recover moneys obtained pursuant to conspiracy — when complaint states single cause of action.* An action at law to recover moneys wrongfully abstracted from a corporation by its president and his son acting in concert in a preconceived plan to defraud the corporation through the employment of the son on an unusual contract of agency made without authority at exorbitant commissions, etc., states but a single cause of action, although renewals of the agreements were made from time to time at increased commissions. Such acts are mere steps in the consummation of a single scheme or conspiracy to obtain moneys by fraud. *Mutual Life Ins. Co. v. McCurdy and McCurdy*, 827.

18. *Conversion by officers of insurance corporation — when complaint should be made definite and certain.* A complaint against the president of an insurance corporation and others which alleges that the defendants, acting jointly, wrongfully and without authority, took certain money belonging to the corporation, consisting of checks, bank bills, United States notes, treasury notes and gold and silver coins of a specified aggregate value, and wrongfully converted the same, should be made more definite and certain when the transactions covered a period of thirteen years, for it is improbable that the conversion was a single transaction. *Mutual Life Ins. Co. v. Raymond*, 828.

19. *When motion for bill of particulars may not be united with a motion to make the complaint more definite and certain.* Motions to make a complaint more definite and certain or for a bill of particulars in the alternative cannot be united, because the first may only be made before and the latter ordinarily after answer unless necessary to enable the defendant to plead.

On a motion to make a complaint more definite and certain the court may require that allegations respecting the nature of the charge be made definite; but neither particulars nor circumstances of time or place should be required. A motion to make a complaint more definite and certain is to enable a party before pleading to ascertain the charges made against him with sufficient definiteness to enable him to plead. *Mutual Life Ins. Co. v. Grannis*, 830.

20. *When complaint states a single cause of action for general damages to corporation by wrongful acts or negligence of officer.* A complaint in an action against the vice-president and trustee of an insurance company which alleges that the defendant was required to preserve the assets of the company and was not authorized to make unlawful or improvident use of its funds, etc., and that it being his duty to examine and approve or disapprove the vouchers for disbursements, he knowingly or negligently approved and recommended the payment of a large number of bills and vouchers which were not proper charges against the company to its damage, states a cause of action for general damage for wrongful acts or negligence as agent of the company. The amounts

**PLEADING — Continued.**

lost through such wrongful acts or negligence are evidence of the damage but not specifically recoverable, and the pleading need not set forth the dates or amounts of the payments or the facts in respect to each.

*It seems*, that such information, if necessary, should be obtained by a bill of particulars after issue joined.

A complaint against such vice-president and trustee which alleges that the defendant, acting in concert with other officers of the company and in disregard of his duty to preserve the property from waste, approved or participated in paying political campaign contributions wholly unauthorized, states a cause of action both for negligence and for wrongful acts as an agent of the company, and the plaintiff should not be required to make an election between the wrongs by making the complaint more definite and certain.

The above considerations also apply to a count alleging that the defendant with other officers, pursuant to a conspiracy, established a "confidential fund," which they disbursed without authority for unlawful purposes, etc. *Id.*

Review of decision holding complaint insufficient when issue was raised by demurrer to answer — facts not stating counterclaim.

*See* ATTORNEY AND CLIENT, 4-7.

Complaint in action against attorney purchasing client's interest.

*See* ATTORNEY AND CLIENT, 6.

When complaint sufficiently alleges capacity of trustee in bankruptcy to sue — when separate causes of action properly united.

*See* BANKRUPTCY, 7, 8.

When unnecessary to plead facts to show estoppel.

*See* CONVERSION, 5.

Complaint by receiver in action to recover stock subscription.

*See* CORPORATION, 7.

Party with different names may be sued without alias.

*See* DEBTOR AND CREDITOR, 2.

Complaint in judgment creditor's action to reach a trust fund — answer subject to demurrer.

*See* DEBTOR AND CREDITOR, 5.

Suit in equity by creditor against stockholders for unpaid subscriptions — sufficient allegation of promise to pay for stock.

*See* DEBTOR AND CREDITOR, 6-12.

Petition to obtain recount of votes.

*See* ELECTION LAW.

Petition in proceeding to revoke letters testamentary should specify misconduct.

*See* EXECUTOR AND ADMINISTRATOR, 8.

Petition for appointment of administrator with will annexed.

*See* EXECUTOR AND ADMINISTRATOR, 9.

Complaint in action for libel must state facts.

*See* LIBEL, 1.

Denials on information and belief insufficient to raise issue upon the allegations of petition on mandamus.

*See* MANDAMUS, 1.

Mandamus by assistant foreman of highways for reinstatement — membership in volunteer fire department must be alleged.

*See* MUNICIPAL CORPORATION, 2.

Damages restricted to loss alleged.

*See* NEGLIGENCE, 2.

Injury to employee through blasting — bill of particulars required.

*See* NEGLIGENCE, 5.

When plaintiff may amend to bring in additional defendants jointly liable.

*See* PARTY.



**PLEADING — Continued**

Amending prayer for relief — when service of proposed amended complaint unnecessary.

See PRACTICE, 6, 7.

Counterclaim alleging duress by the pursuance of a legal remedy is demurrable.

See SALE, 7.

**POWER OF SALE.**

When power of sale to executor does not fail through invalidity of a part of bequest — equitable reconversion

See WILL, 2.

**PRACTICE.**

1. *Case on appeal — exceptions improperly stricken out.* When an exception is taken to the court's refusal to charge specifically and in the language requested certain written requests submitted, and the court states that the requests will be given to the stenographer to copy in the record, a specific exception to the denial of each of such requests should not be stricken from the printed case upon the theory that the "exceptions" did not appear in the stenographer's minutes.

A case should be made up so as to state the truth as to what took place at the trial, and substance should not be sacrificed to form. *People v. Browne*, 38.

2. *When actions should be consolidated.* An action upon a promissory note brought in the City Court of New York should be consolidated with a prior action upon a promissory note brought in the Supreme Court when the only grounds upon which the consolidation is resisted is the possibility that the plaintiff may get his case upon the short calendar of the City Court and obtain an earlier trial. *Gospel v. Robinson Machine Co.*, 160.

3. *Sums — payment of costs by defendant — attachment in consolidated action.* On such consolidation, however, the defendant should pay the costs in the City Court, and an attachment granted in that court should not be vacated even though the plaintiff has obtained security in the prior action in the Supreme Court. *Id.*

4. *Revival of action.* In an action at law there is no fixed time within which the action may be revived against the executor of a deceased defendant. The time within which an action in equity can be revived is ten years. *Washington Trust Co. v. Baldwin*, 186.

5. *Sums — application denied for laches.* But although there is no fixed time within which application to revive an action at law must be made, the court may deny the application for laches, and where, without excuse, a party delays until the Statute of Limitations would have barred the action, a motion to revive it should be denied. *Id.*

6. *Pleading — amending prayer for relief.* Although the prayer for relief is not a part of the cause of action it is part of the complaint, and a motion to amend the prayer is a motion to amend the complaint. *McVey v. Security Mutual Life Insurance Co.*, 466.

7. *Sums — when service of formal amended complaint not necessary.* But upon such amendment not affecting the facts alleged, where it is merely sought to ask equitable relief instead of money damages, a plaintiff is not required to serve a copy of the proposed amended complaint with the motion papers; especially so, when the proposed prayer for relief is set out in the moving papers. *Id.*

8. *Main issues in suit in equity determined by court before reference ordered.* In an action in equity by a principal against his agent for an accounting when there is an issue as to the basis of the agent's compensation, the trial of the main issue should be had before the court before the case is sent to a referee. If on such trial it appear that an accounting is necessary, the reference should be provided for in the interlocutory decree. *Prince Line, Limited, v. Seager Co.*, 697.

9. *Order resettled to show moving parties.* When a motion is made to vacate an order appointing a receiver in an action of foreclosure and asking that the moving parties be brought in to defend, the order denying the application should

**PRACTICE** — *Continued.*

state that the motion was made on behalf of the moving parties, and should be resettled to show that fact. *Dewsnap v. Matthews*, 789.

10. *When rival claimants to fund may be interpleaded.* When two brokers each claim a right to commissions, and there is no pretense that the defendant is liable to both, he may, upon paying the amount into court, interplead the claimants to litigate the issues between themselves. *Trembley v. Marshall*, 839.

When appellant entitled to have evidence excluded on objection of the respondent appear in the case.

*See* APPEAL, 3.

Reference to hear and determine unauthorized in proceedings to compel attorney to pay over moneys.

*See* ATTORNEY AND CLIENT, 2.

Motion to set aside judgment erroneously entered upon report of a referee — how governed.

*See* ATTORNEY AND CLIENT, 3.

Review of decision holding complaint insufficient when issue was raised by demurrer to the answer — truth of allegations of answer not considered.

*See* ATTORNEY AND CLIENT, 4.

When separate causes of action against the transferees of a bankrupt are properly united.

*See* BANKRUPTCY, 8.

In regard to the allowance of costs.

*See* COSTS, generally.

When warrant of commitment sufficient.

*See* CRIME, 4.

When legal action not prerequisite to suit in equity by creditor against stockholders for unpaid subscriptions.

*See* DEBTOR AND CREDITOR, 12.

In regard to examination of party before trial.

*See* DEPOSITION, generally.

Petition in proceeding to revoke letters testamentary should specify misconduct.

*See* EXECUTOR AND ADMINISTRATOR, 8.

When reference granted to assess damages of defendant in injunction action.

*See* INJUNCTION, 1.

When mechanic's lien may not be canceled by order.

*See* LIEN, 1.

Remedies of lienor where bond has been given to discharge mechanic's lien.

*See* LIEN, 3.

When mandamus is proper remedy for reinstatement of policeman.

*See* MANDAMUS, 3.

Defect in writ of mandamus available until made peremptory.

*See* MUNICIPAL CORPORATION, 3.

When amendment to correct name of defendant corporation allowed — payment of costs.

*See* PLEADING, 2.

Action for accounting and damages in tort cannot be united.

*See* PLEADING, 8.

Dismissal upon merits upon demurrer to complaint.

*See* PLEADING, 9.

Facts constituting conversion — counterclaim on contract demurrable.

*See* PLEADING, 11.

Motion for bill of particulars may not be united with motion to make complaint more definite and certain.

*See* PLEADING, 19.

**PRACTICE**—*Continued.*

Defense of prior determination in quo warranto proceedings should be taken by motion.

*See* QUO WARRANTO.

Decree must accord with admitted facts.

*See* REAL PROPERTY, 13.

Compulsory reference to examine long account not authorized until right to accounting determined.

*See* REFERENCE.

[For table containing all sections of the Code of Civil Procedure cited and construed in this volume see *ante*, p. xlv.]

*See* APPEAL, generally.

*See* PLEADING, generally.

**PRINCIPAL AND AGENT.**

1. *Right of principal to revoke agency—agent not entitled to continue employment.* A contract made through general agents or managers appointing a local insurance agent for five years may be revoked by the principal, and, whether the revocation be right or wrong, the principal is entitled to enjoin the agent from continuing the occupation.

If the principal has been guilty of a breach of contract, the agent's remedy is an action for damages; he is not entitled to continue to act after revocation. *Star Fire Insurance Co. v. Ring*, 107.

2. *Broker's action for commissions—when broker not procuring cause of sale—broker cannot act for both parties.* In a broker's action for commissions it appeared that he was first engaged by the purchaser to appraise the property, and was thereafter authorized by the intending purchaser to make an offer to the seller, who was acting as executor, which offer was declined on the ground that the property must be sold at auction. The plaintiff did not disclose his principals, and testified that the defendant offered him commissions if he would have his principals attend the sale and they were successful bidders. The plaintiff reported to his principals that their offer was refused, and it was decided that the plaintiff should not attend the auction, but that the bidding should be made by another party, who appeared at the sale and obtained the property at a lower figure than the offer. It further appeared that the plaintiff had been compensated by the persons for whom he had appraised the property, and that the purchaser had determined to buy the property if it could be had at a reasonable figure before employing the plaintiff to appraise it.

*Held*, that the plaintiff was not the procuring cause of the presence of the buyer at the sale, and performed no service which entitled him to commissions;

That his claim against the seller for commissions was entirely inconsistent with his relations with the purchaser, as he could not act for both. *Perkins v. Aldrich*, 170.

3. *When insurance agent not entitled to commissions on renewal premiums after discharge.* In the absence of an agreement limiting an insurance agent's commissions to premiums received by the company during the continuance of his agency, he is entitled to commissions on renewal premiums received after the termination of his agency upon policies written during its continuance.

The parties, however, may agree to the contrary, and where a contract of agency for an indeterminate period provides for commissions on the original or renewal cash premiums collected "during his continuance as said agent," the agent is not entitled to commissions after the termination of his employment.

The above construction will be given to the contract although a subsequent clause provides, that, if in any year the agent secure new insurance on the plan stated aforesaid "subject to all the terms and conditions" thereof amounting to a certain sum, he shall be entitled to commissions upon the renewal premiums paid on such policies, etc. The two provisions should be read together and are not inconsistent. *Helyn v. New York Life Insurance Co.*, 194.

4. *Moneys advanced in connection with securing concessions from foreign government.* It is not unlawful or immoral for a principal to advance moneys to an agent employed to secure mining concessions from a foreign government to pay the expenses of the foreign governor to the capital to interview the President of the country and to pay for publishing concessions reported by the agent to

**PRINCIPAL AND AGENT — Continued.**

have been granted. The principal may recover from the agent moneys advanced for that specific purpose on the failure of the agent so to apply them. *Allen v. O'Bryan*, 218.

5. *Same — accounting — burden on agent to show disposal of principal's money.* In an equitable action of accounting the burden is upon the agent to show that he has performed his duties and how he has expended his principal's money advanced for the specific purpose. *Id.*

6. *Ratification by principal.* A ratification of an unauthorized sale of stock by a broker, where no question of the rights of third persons is involved, implies a conscious and intended approval of the act done. It rests upon an actual and existing purpose to make such approval, and to meet this requirement it must be made with full knowledge of all the facts. *Burnham v. Lawson*, 889.

7. *Same — conversion by stockbroker making unauthorized sale.* In an action against a broker to recover for the unauthorized sale of stock, it appeared that the plaintiff arranged to have his holdings cared for during his absence on a vacation and gave the defendant sufficient collateral to protect the account. The defendant sold out some of plaintiff's holdings and notified him by letter without stating the price for which the stock was sold.

*Held*, that as the plaintiff was not apprised of all the facts, a delay of twelve days in repudiating the transaction did not amount to a ratification thereof. *Id.*

8. *Same — measure of damages.* In an action to recover damages for such unauthorized sale it is error to charge that the plaintiff may recover the difference between the price at which the defendant sold the stock and the highest market price reached down to a reasonable time after the plaintiff received notice of the sale, with interest on the difference. The error consists in allowing the plaintiff to pick out the highest market price of the securities at any time between the date of sale and a reasonable time after receiving notice, while the proper rule is that he is only entitled to the highest price reached within a reasonable time after the plaintiff had learned of the conversion of the stock within which he could go into the market and repurchase it. When the facts are undisputed reasonable time is a question of law. *Id.*

9. *When overpayment to principal not recoverable from agent.* An agent acting within the scope of his authority cannot be held liable by persons other than his principal for moneys properly received by him in the name and in the business of the principal.

Thus, where the plaintiff purchased goods of the defendant as agent to whom he paid the purchase price without any express promise by the agent to pay the sum to the principal, and thereafter on demand by the principal again paid a portion of the purchase money, he cannot recover the overpayment from the agent. This, because payment to an agent who has authority to collect is payment to the principal and an absolute discharge of the debt, and it is of no consequence to the debtor that the agent fails to account to the principal. *Fisher v. Meeker*, 452.

10. *When overpayments made to messengers on forged bills may be recovered from the principal.* An employer who puts it within the power of his employee to defraud a third person by intermingling genuine and fraudulent bills and collecting money thereon, may be held responsible by an innocent third party for the dishonesty of the employee.

Thus, when a telegraph company has been accustomed to send its messengers to collect small sums due for messenger service and the messenger forges bills which he intermingles with the genuine bills and presents to the customer's cashier in charge of the petty cash for payment, the customer may recover the amount of the payments made on the forged bills. *Wilmerding v. Postal Telegraph-Cable Co.*, 685.

11. *Same — when messengers of telegraph company clothed with apparent power to collect.* Although such messenger is not the general agent of the company, yet when he is empowered to collect, that act is within the scope of his authority and the principal is bound.

The fact that the act of the agent is *ultra vires* is immaterial if the act be within the scope of his authority.

The customer making payments under the circumstances aforesaid is entitled to recover, although he might by an investigation have discovered the forgery. *Id.*

**PRINCIPAL AND AGENT** — *Continued.*

12. *Commissions of factor on damaged goods taken over by insurer — disbursements to insurance adjuster and attorney.* When a factor's contract entitles him to a certain percentage on a sale of goods for the principal and a less percentage if the goods are not sold by the factor, but are redelivered to the principal or transferred to other parties at his request, the factor is only entitled to the less percentage when the goods are damaged by fire and taken over by the insurer under an option in the policy. The factor's contract should be construed to mean that he is entitled to the higher commission only upon effecting a sale in the general course of business. The taking over of the goods by the insurer is in the nature of a transfer to third parties without sale.

But when such insurance is taken out both for the benefit of the principal and the factor, the latter is entitled to be reimbursed for reasonable fees paid to an adjuster for services rendered and for legal advice. *Wertheimer v. Talcott*, 840.

Right of real estate broker to commissions where parties have agreed upon terms of sale, but fail to execute contract.

*Comrie v. Metropolis Securities Co.*, 891.

Failure of proof to show authority to indorse promissory notes as agent of defendant — judgment against defendant reversed.

*Fourteenth Street Bank v. Gersten*, 905.

When principal cannot question validity of sealed instrument executed by agent.

*See CONTRACT*, 6.

Breach of contract — erroneous exclusion of evidence that person negotiating contract was not agent of defendant.

*See CONTRACT*, 14.

Action by agent to recover upon contract to procure legislation.

*See CONTRACT*, 16.

Basis of agent's compensation should be determined by court before reference ordered in equity action.

*See PRACTICE*, 8.

When rival brokers claiming commissions may be interpleaded.

*See PRACTICE*, 10.

When agent entitled to commissions on furnishing purchaser.

*See REAL PROPERTY*, 7.

**PRINCIPAL AND INTEREST.**

*See INTEREST.*

**PRINCIPAL AND SURETY.**

Secured creditor of corporation not entitled to preference upon notes of the corporation which are indorsed by third parties.

*See BANKRUPTCY*, 3.

Failure of obligee of bond collateral to contract to show damage.

*See CONTRACT*, 7.

Action against surety on bond given to discharge mechanic's lien — election of remedies.

*See LIEN*, 8.

*See GUARANTY*, generally.

**PROCESS.**

When warrant of commitment sufficient.

*See CRIME*, 4.

Right to serve process upon Commissioner of Insurance passes to assignee.

*See JUDGMENT*, 1.

**QUO WARRANTO.**

*Determination of Attorney-General not to bring action is not binding on successor — practice — when defense of prior determination should be taken by motion.* The bringing of an action of quo warranto against a person who usurps or unlawfully holds a public office is in the discretion of the Attorney-General. A deci-

**QUO WARRANTO — Continued.**

sion by a prior incumbent of the office that the action should not be brought is not *res adjudicata* or binding upon his successor.

When the Attorney-General has served a summons and complaint in an action of quo warranto the questions as to whether the action was barred by the decision of his predecessor and whether service should be set aside should be raised by motion and not by answer or by plea in bar. *People v. McClellan*, 177.

**RAILROAD.**

1. *Refusal to accept transfer — measure of damages of passenger ejected.* A passenger upon a surface railroad was given a transfer so punched that the time limit had already expired. On calling the attention of the conductor to the fact he was assured that the transfer would be honored. The transfer, however, was refused by the conductor on the car to which the passenger transferred and he was ejected.

In an action for damages,

*Held*, that the plaintiff was not entitled to recover damages consequent upon his unlawful ejection as he had boarded the car knowing that the transfer upon its face did not entitle him to ride;

That the act of the conductor in refusing the transfer and ejecting the plaintiff was not unlawful or wrongful;

That although the plaintiff might be entitled to recover the statutory penalty and the price paid for his fare, he was not entitled to recover in addition for indignities to which he voluntarily subjected himself. *Nicholson v. Brooklyn Heights Railroad Co.*, 13.

2. *Negligence — failure of railroad to repair pavement adjoining tracks — when liable for injuries caused thereby.* A railroad is liable for injuries received by reason of its failure to repair the pavement between its tracks and for two feet in width outside its tracks as required by section 98 of the General Railroad Law, irrespective of whether any request or demand for such repair has been made by the local authorities. *Schuster v. Forty-second Street, M. & St. N. Ave. R. Co.*, 197.

3. *When rules as to issue of transfers not unreasonable.* A railroad may adopt and enforce rules respecting the conduct of its business for its own protection, provided they do not seriously inconvenience passengers or subject them to probable loss or deprive them of legal rights.

The rule of a street railroad which issues transfers for several intersecting lines that a passenger must demand the transfer at the time of payment of fare is not unreasonable, for the company is entitled to protect itself against dishonest persons who may seek to obtain more than one transfer. *Ketchum v. New York City Railway Co.*, 248.

4. *Power of Appellate Division on review of decision of Commissioners.* An appeal from the Board of Railroad Commissioners refusing a certificate of public convenience and necessity for a proposed street surface railroad comes before the Appellate Division as an original application to be determined upon the record made before the Board of Railroad Commissioners, or upon such further evidence and facts as the court may deem essential to enable it to make a proper determination. It is not merely a review of the decision of a subordinate tribunal which casts upon the petitioners the burden of showing affirmatively that the Commissioners erred in their determination. *Matter of Rochester, Corning, Elmira Traction Co.*, 521.

5. *Same — certificate of public convenience and necessity.* The fact that a proposed street surface railroad will parallel an existing steam railroad, and will injuriously affect it by competition, is not necessarily ground for refusing a certificate.

The real question is whether the existing facilities for railroad travel are adequate, and the fact that an existing steam railroad is sufficient to serve through transportation of passengers and freight, does not show that a street surface railroad in the same locality is not a necessity for local transportation.

Evidence taken before commissioners examined, and

*Held*, that a certificate of public convenience and necessity should be granted. *Id.*

6. *Penalty for refusing transfer — when plaintiff not entitled to recover.* The penalty for refusing a transfer on street surface railroads in the city of New York

**RAILROAD — Continued.**

imposed by section 104 of the Railroad Law is designed to promote the public convenience, and not to put money in the pocket of an individual who does not come fairly within the provisions of the statute. Thus, when it is admitted that the plaintiff became a passenger for the sole purpose of bringing action for the penalty, she is not entitled to recover. Under such circumstances she is not a party "aggrieved" within the meaning of the statute. *Nicholson v. N. Y. City R. Co.* (No. 4), 858.

Right of way — pedestrian struck by street car between intersecting streets.  
*Fitzgerald v. Brooklyn Heights Railroad Co.*, 893.

Power of president of railroad to direct performance of services when employment of consulting engineer has been authorized by the directors — director and secretary may receive such appointment.  
*See CORPORATION*, 1-3.

When maintenance of railroad viaduct does not injure easements.  
*See EMINENT DOMAIN*, 3.

For actions against railroads to recover for injuries received.  
*See NEGLIGENCE*, 1, 4, 7, 8, 9, 10, 15, 16, 17, 21, 22, 24.

Erroneous charge as to presumption arising from failure of defendant to produce passengers who witnessed street car accident.  
*See TRIAL*, 2.

**REAL PROPERTY.**

1. *Covenant against offensive trades — when not enforced by reason of altered character of neighborhood.* Although a restrictive covenant made at a time when property in the locality was used for dwelling houses provides that no building other than dwelling houses or stores of brick, stone or marble, etc., shall be erected, and prohibits the carrying on of offensive trades, yet when the locality has ceased to be used for residential purposes, and is filled with inferior tenement houses, stables and factories, there has been such a change in the character of the neighborhood as to defeat the object of the covenant, and a court of equity will refuse to enforce it by injunction at the instance of an owner who otherwise would be entitled to the benefit of the restriction. *Schwarz v. Duhne*, 105.

2. *Vendor and purchaser — contract to convey title free from incumbrances — failure of vendor to clear title.* In an action by a vendee for specific performance or for damages on a breach of a contract to convey lands, it appeared that the property was to be conveyed free of incumbrances except as specifically stated, and also free from orders of the tenement house department to date of contract, which orders, if any, were to be removed by the vendor. It was shown that the premises were subject to a lease then unexpired, which contained a clause that in the event of a sale by the owner the lessee would surrender the unexpired term for a sum stated. It also appeared that the tenant had offered to surrender and that the vendor had actually ousted him, but made no effort to clear the title of the tenement house department orders. On all the evidence,

*Held*, that a finding that the vendor was unable in good faith to complete her contract was not warranted by the evidence, and that the plaintiff was entitled either to specific performance or to damages. *Schreiber v. Elkin*, 244.

3. *Vendor and purchaser — specific performance — when tender by vendee not necessary.* When a vendor has agreed to convey an unincumbered title and it is conceded that an inheritance tax which was a lien upon the property had not been paid, the vendee is entitled to equitable relief although he omitted to tender performance on his part, for under the circumstances tender would have been an idle ceremony.

This is true even though the parties be considered to have mutually abandoned the contract; under the circumstances the vendee in equity is entitled to recover the earnest money paid without tender of performance. *Lese v. Lawson*, 254.

4. *Vendor and purchaser — lands described by metes and bounds — evidence — when understanding as to meaning of "more or less" inadmissible.* When a contract for the sale of real estate describes the premises by metes and bounds, evidence of what the parties understood the words "more or less" to mean is inadmissible in an action on the contract.

**REAL PROPERTY — Continued.**

In an action by a vendee to recover earnest money paid on a contract to convey lands described by metes and bounds which were qualified as being "more or less," the payment of the consideration was not dependent upon the foot frontage or specific area. The evidence showed a good record title to 170 feet frontage with a possession by the vendor of 1.25 feet more which had never been contested and which would probably ripen into title. On all the evidence,

*Held*, that the vendee was not justified in refusing title, and was not entitled to recover the earnest money. *Beardmore v. Barry*, 834.

5. *Statute of Frauds — contract of sale by life tenant does not bind remaindermen not joining therein.* A written contract to sell lands executed by a life tenant but not by the remaindermen is not binding upon the latter, even though executed with their approval and the vendee is not entitled to set aside a conveyance made to another party. *Brustmann v. Motrie*, 895.

6. *Facts insufficient to establish priority of contract.* Mere proof of the willingness of the remaindermen to sell their interest in connection with that of the life tenant does not establish a contract binding upon them. *Id.*

7. *When vendee not entitled to set aside conveyance to subsequent purchaser.* When a vendee cannot hold a vendor under a void oral contract to sell lands, he has no greater right against the grantee of the vendor.

Evidence as to respective dates of agreements to sell lands to different parties examined and

*Held*, that the evidence established that the grantee's contract was prior in date.

The mere fact that the vendors paid commissions to a real estate agent acting for a vendee does not establish that a valid contract with him was consummated, as a broker may be entitled to commissions on furnishing a purchaser whether or not the contract be afterwards consummated. *Id.*

8. *When bidder on execution sale who fails to complete purchase not entitled to property sold.* A bidder at the sale of property on execution is not vested with title by the mere act of bidding the property off, and if payment is postponed until the following day and in the meantime the property is taken from the sheriff by requisition in another action, the bidder is not entitled to the premises.

A sheriff must sell for cash and to consummate a sale there must be a bidder, the property must be struck off and the bidder must complete his purchase by complying with the terms of sale. *Rowe v. Granger*, 459.

9. *Same — When purchaser loses title by judgment against sheriff in another action.* When a sheriff accepts a bid on sale on execution, but postpones payment until the following day and the property is taken from the sheriff under requisition in another action in which the plaintiff succeeds, the judgment in that action is binding on the prior bidder even though the sheriff by postponing the time of payment be considered to have become the bailee of the purchaser. *Id.*

10. *Contract by lessee and executors of deceased lessor to assign lease — specific performance refused.* The owner of a lease containing covenants for renewal entered into a contract to assign the same to the plaintiff upon the condition that the latter obtain from the executors of the deceased lessor an agreement to renew the lease at its expiration. At the time of performance it was contended by the plaintiff that the executors of the deceased lessor were without power to continue the lease or renew it for a period extending beyond the termination of their trust. The executors and those interested in the estate of the lessor affirmed the agreement for the assignment of the lease, but the plaintiff was not willing to accept the proffered assignment on the ground that the executors were without power to perform.

*Held*, that the lessee in his agreement to assign made no covenant that the lease and renewals thereof were valid and enforceable, he merely agreeing to transfer the lease as it stood;

That although the agreement was conditioned upon the lessor's executors being willing to make a new lease, as they were willing to make it, the plaintiff by refusing to accept the assignment upon the ground that the executors were without power to execute the new lease was in default and not entitled to a specific performance of the agreement to assign. *Pratt v. Clark*, 633.

11. *Easements in light and air created by deed — grantees take subject thereto.* A perpetual easement in light and air when created by deed runs with the land, and



**REAL PROPERTY—Continued.**

the rights and obligations thereof pass to the grantees of the dominant and servient tenements.

The owner of lands sold a portion in the center of a plot, granting easements in light and air over an adjoining portion specified and reserving the same easements for the benefit of the portion not sold. Thereafter the owner conveyed to the defendant a portion of the lands which included the portion servient to the easement, and also conveyed to the plaintiff other portions entitled to the benefits of said easements, both deeds reciting the existing easements.

*Held*, that the plaintiff was entitled to an easement in light and air over the portion servient thereto conveyed to the defendant, and that the defendant could not obstruct the light and air by building upon said portion. *Mitchell v. Reid*, 641.

12. *Action to have deed declared to be a mortgage—judgment.* When in an action to determine the title to real property, both the plaintiffs and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt due the grantee, the court is without power to render judgment that the deed was void as champertous and because given while the property was in the adverse possession of another. *Bradt v. McClenahan*, 768.

13. *Same—court confined to decrees in accordance with facts admitted by the parties.* The formal admissions in the pleadings bind the parties making them, and the court is confined to a determination of the fact that the deed was in fact a mortgage and to the ascertainment of the amount due thereon. *Id.*

14. *Vendor and purchaser—contract sufficient to warrant specific performance—when vendee entitled thereto.* Requirements of a contract to sell lands sufficient to authorize decree of specific performance stated.

Although the fact that a title tendered may impose a law suit upon the vendee to establish the boundaries is not an incumbrance in a legal sense, the tender of such deed is not a compliance with a contract of sale requiring a "proper deed" assuring the grantee a fee simple free from all incumbrances.

A contract to give a "proper deed" calls for a marketable title, which is defined as one free from reasonable doubt, and a title which must be defended by litigation is not free from doubt.

When a vendor has agreed to convey by proper deed a title in fee simple free from all incumbrances by specific metes and bounds and it develops that by the bounds described access to other property of the vendor would be cut off, the vendee does not thereby lose his right to specific performance and is not in default by reason of a refusal to accept a deed which fails to set out the boundaries agreed upon. *Wadick v. Mace*, 777.

15. *Same—equitable powers of court.* It seems, that under such circumstances a court of equity in the exercise of its discretion may not compel the execution of a deed which will cut off the grantor from access to other lands, but may order a reference to determine an equitable performance of the contract which will be fair to both parties. *Id.*

Right of real estate broker to commissions where parties have agreed upon terms of sale, but fail to execute contract.

*Comrie v. Metropolis Securities Co.*, 891.

Injunction to restrain the execution of a warrant of dispossession issued in summary proceedings.

*Carmer v. Rhodes*, 915.

When conveyances and contract do not create a trust—contract to convey lands at future date, when subject to revocation.

*See* CONTRACT, 12.

Right to compensation for building erected after condemnation proceedings were commenced.

*See* EMINENT DOMAIN, 7, 8.

When double house is not two buildings within the meaning of the Liquor Tax Law.

*See* INTOXICATING LIQUOR, 3-5.

Breach of covenant for quiet enjoyment by refusal of possession.

*See* LANDLORD AND TENANT.

**REAL PROPERTY — Continued.**

When partition agreement resting in parol will be enforced in equity.

*See* PARTITION.

Conveyance by widow as sole devisee conveys only her dower right when child was born after making of will.

*See* PAYMENT.

Action by real estate broker for commissions.

*See* PRINCIPAL AND AGENT, 2.

*Bona fide* purchaser of real property not liable for conversion of fixtures on which no lien was filed.

*See* SALE, 2.

Cemetery association not liable for assessment for street opening — when abutting owner entitled to damage for easements.

*See* TAX, 3, 4.

When deed executed by spendthrift in trust for his own benefit not procured by fraud.

*See* TRUST, 1-3.

When devise of real property in trust for children does not suspend the power of alienation.

*See* WILL, 1, 11.

When power of sale to executor does not fail through invalidity of a part of bequest — equitable reconversion.

*See* WILL, 2.

*See* EMINENT DOMAIN, generally.

**RECEIVER.**

Action by receiver to set aside assignment of trade marks as in fraud of creditors — facts not showing fraud.

*See* ASSIGNMENT, 1-3.

When corporation liable on contract repudiated by receivers.

*See* CONTRACT, 8.

Acceptance of bonds and stocks as payment for construction of a railroad is not a stock subscription, and contractor is not liable to receiver for par value.

*See* CORPORATION, 6-8.

Supplementary proceedings — estoppel of original owner and receiver from claiming title after property has passed to a second purchaser — receiver cannot question consideration of transfer prior to receivership.

*See* EVIDENCE, 3.

Facts necessary to justify appointment of receiver for partnership business.

*See* PARTNERSHIP, 2.

**REFERENCE.**

*Practice — compulsory reference in action for accounting not authorized until right to accounting determined.* In an equitable action for the specific performance of an alleged agreement and for an accounting, when the execution of the agreement is in issue there can be no compulsory reference on the ground that the examination of a long account is involved until the right to the accounting is determined by trial at Special Term. *Cuyard v. Texas Crude Oil & Mining Co.*, 299.

To hear and determine is unauthorized in proceedings to compel attorney to pay over moneys.

*See* ATTORNEY AND CLIENT, 2.

Necessity in judgment creditor's action to permit other creditors to become parties.

*See* DEBTOR AND CREDITOR, 18.

Findings not embodied in report not considered.

*See* EXECUTOR AND ADMINISTRATOR, 5.

When reference to assess damages of defendant in injunction action premature.

*See* INJUNCTION, 1.

**REFERENCE** — *Continued.*

Main issues in suit in equity should be determined by court before reference ordered.

*See PRACTICE, 8.*

Power of court to compel reference to determine an equitable performance of a contract to convey lands.

*See REAL PROPERTY, 15.*

**RELEASE.**

Erroneous charge as to whether release from liability for injury was procured by fraud.

*See NEGLIGENCE, 19, 20.*

**RELIGIOUS SOCIETY.**

Membership corporation although organized for benevolent purposes is subject to transfer tax.

*See TAX, 1, 2.*

*See CHARITABLE USES.*

**REPLEVIN.**

Erroneous assessment of damages based upon affidavit of plaintiff.

*See EVIDENCE, 5.*

**RESTRICTIVE COVENANT.**

*See COVENANT.*

**REVISED STATUTES.**

*See STATUTE.*

**REVIVAL OF ACTION.**

When application denied for laches.

*See PRACTICE, 4, 5.*

**ROBBERY.**

Conviction of robbery in the first degree sustained.

*See CRIME, 12.*

**RULES.**

[For table of the General Rules of Practice cited and construed in this volume, see *ante*, p. xlv.]

**SALE.**

1. *Conditional sale — effect of retaking property.* When the vendor under a conditional sale retakes the property on the default of the vendee, he is not entitled to both the property and the purchase price. Under such circumstances a claim for the purchase price is not available as a counterclaim. *Edmead v. Anderson*, 16.

2. *Failure to file contract of conditional sale — mechanic's lien — election of remedies — when purchaser of premises not liable for conversion.* The plaintiff installed a heating plant in a building under a conditional contract of sale providing that the title remain in the plaintiff until he was fully paid in cash. After the installment of the plant and before payment, the owner of the building conveyed the premises, and the plaintiff thereafter filed a mechanic's lien against whatever interest the former owner had in the premises. The purchaser of the property in his turn conveyed to the defendant, of whom the plaintiff demanded a return of the heating plant, and it being refused sued for conversion.

*Held*, that the complaint was properly dismissed because the contract of conditional sale had not been filed in the registrar's office until six months after the defendant had purchased the property without notice of the plaintiff's claim;

That although the plaintiff and the original owner could by agreement reserve the character of the heating plant as personalty, such agreement was not binding against a *bona fide* purchaser who took the plant as part of the realty without notice;

That as the plaintiff had filed a mechanic's lien against the interest of the original owner, it was inconsistent with his claim of title to the heating plant, and was an election of remedies;

**SALE—Continued.**

That as the plaintiff had not complied with chapter 698 of the Laws of 1904, providing that every contract of conditional sale of chattels attached to a building shall be void against a subsequent *bona fide* purchaser of the premises unless the conditional contract be filed, the defendant in purchasing the property was justified in assuming that no claim of title would be made to the heating plant, especially so as a mechanic's lien therefor had been filed. *Kirk v. Crystal*, 32.

3. *Evidence—erroneous exclusion and admission of evidence as to damage.* In an action founded upon the breach of a contract to sell and deliver lumber purchased from a wholesale dealer, it is error to admit evidence of the retail price of lumber as a basis of damage. Under such circumstances the damage is measured by the difference between the wholesale price and the price at which the defendant agreed to sell and deliver, and not the retail price which involves the expense of handling, storing and profit to the dealer.

So, too, it is error to exclude testimony of a sales agent of a foreign manufacturer who is shown to be familiar with the wholesale price of similar lumber at the place of delivery in this State. *Kilpatrick v. Whitmer & Sons, Incorporated*, 98.

4. *When vendor under conditional sale estopped from asserting title against purchaser from vendee.* Although chattels are sold under contract of conditional sale whereby the title remains in the seller until payment, yet when the contract of conditional sale is not filed, and the seller receipts a bill for the amount due, stating that two notes and one check were received, and a third person to whom the receipt is exhibited purchased the property from the vendee in reliance upon the receipt, having first examined the records and finding nothing of record, the vendor is estopped from asserting title against the purchaser under a claim that the property has not been paid for. *McLean v. Griot*, 100.

5. *Sum—payment by promissory note—receipt.* A promissory note given by a buyer may or may not constitute payment depending upon the agreement of the parties, but when the receipt showing the giving of a note states that the account is paid, a third party purchasing from the vendee may rely upon the receipt.

In any event a question for the jury is raised and a direction of a verdict for the seller is error. *Id.*

6. *Correspondence not establishing contract.* In an action to recover damages for the breach of an alleged contract to sell and deliver coal, it appeared that after a conversation with the defendant's brother as to the terms of the alleged contract plaintiff was directed to confirm it in writing; that thereupon he wrote to the defendant: "In accordance with my conversation with you \* \* \* you may enter my order for about 1,000 tons of broken coal per month for shipment previous to February 1. \* \* \* For the next three or four months I may not be able to take my full monthly quota, but shall live up to my obligations as nearly as possible." The defendant did not reply to this letter, and thereafter the plaintiff wrote asking when "can I expect some furnace coal on my order." The plaintiff testified that the letter contained the entire agreement as he understood it. On all the evidence,

*Held*, that as it was not stated in the letter that a contract had been made the day before, and as the proposals of the letter were never accepted, there was no contract binding upon either party;

That, although the defendant had subsequently delivered two small orders of coal, the evidence did not justify a finding that the deliveries were made under the alleged contract. *Theford v. Herbert*, 181.

7. *Pleading—threat to pursue legal remedy not duress.* In an action for the breach by the vendee of a contract for the sale of hops, the answer as a counterclaim alleged that the defendant was in great business distress by reason of the maturity of notes held by the plaintiff, which it was unable to meet and that the plaintiff threatened suit thereon unless the defendant would cancel portions of the contract of sale and resell the goods to the vendor at an inadequate price; that the defendant was compelled by said duress to accede to the demands of the plaintiff, and gave it a note for \$800 without consideration, which note though paid at maturity was extorted by duress.

*Held*, that, conceding that the counterclaim waived the tort and stated a demand for money had and received, it was subject to demurrer for the plaintiff was

**SALE**—*Continued.*

only following a legal right. A threat to pursue a legal remedy to which a party is entitled is not duress;

That, in any event, the defendant by paying the note had waived the duress. *Lilienthal v. Bechtel Brewing Co.*, 205.

8. *Delivery of goods to railroad to order of vendee.* In an action by a seller for damages by reason of the failure of the buyer to accept and pay for goods, it appeared that the contract called for the sale and delivery of twenty-four bales of hops; that after the delivery of sixteen bales by the seller the buyer did not reply to the seller's demand that the delivery of the balance be accepted. The seller stored the balance of the hops, branded and tagged with the name of the buyer, with a warehouseman and with a railroad company, sending the invoices to the buyer, who retained the same without objection but failed to remove the hops. The seller sent the buyer a second copy of the invoices. The buyer replied claiming the right to take the hops at his convenience, and the seller being notified by the railroad to remove the hops stored them in a warehouse for the buyer's account and sent him the warehouse receipts, which were also retained.\*

By the custom of trade, where no time is specified for delivery of hops, it must be made before new crops come in.

*Held*, that the complaint was improperly dismissed;

That in an action for goods sold and delivered the seller may, upon tender of performance and demand of payment and refusal, treat the property as belonging to the buyer and sue for the recovery of the agreed price;

That an actual physical delivery of the goods is not necessary, and where manual delivery of the goods is inconvenient on account of bulk, placing them in the power of the buyer with a symbolic delivery by forwarding the warehouse receipts, is sufficient. *Horst v. Montauk Brewing Co.*, 300.

9. *Error to dismiss the complaint because goods sold to defendant were shipped to third party.* It is error to dismiss a complaint to recover the value of goods sold and delivered when there is evidence that it was agreed that the goods were to be charged to the defendant but billed and shipped to a third party. *Frazer & Houghton, Limited, v. Mott*, 701.

10. *Sane — evidence.* Bills, receipts and instruments of like character are always open to explanation, and are not conclusive upon any of the parties. *Id.*

Action upon merchant's account — evidence showing debt.

*Barron v. Lanes*, 914.

Reinvestment of title in vendee — rights of trustee in bankruptcy of the vendee — Personal Property Law, section 25.

*Buckwalter Store Co. v. Stratton*, 915.

Bailee who after notice waives right to sell pledged stock cannot recall such waiver without second notice.

*See* BAILMENT.

Measure of damages upon failure to furnish machinery adapted for a specific use — loss of rental value of mill — interest.

*See* DAMAGES, 2-4.

Admission of parol evidence showing that written contract of sale was conditional.

*See* EVIDENCE, 2.

Conversion by stockbroker making unauthorized sale — measure of damages.

*See* PRINCIPAL AND AGENT, 6-8.

**SCHOOL.**

When trust for foreign unincorporated college invalid.

*See* WILL, 14.

**SERVICES.**

Action to recover for.

*See* MASTER AND SERVANT, generally.

**SESSION LAWS.**

[For table containing all Session Laws cited and construed in this volume *see ante*, p. xlii.]

**SET-OFF.**

*Equity — assignment of unmatured claim by insolvent — when assignee takes subject to set-off.* Where an insolvent assigns a claim not yet due, the debtor may off-set against the assignee a claim against the assignor due at the time of the assignment. In equity the fact that the claim of the insolvent is not due when he makes the assignment does not prevent a set-off, for it is only the difference between mutual debts that the court regards as owing by or to the insolvent.

Although the claim of the insolvent was for damages against a city for injury to real estate by the change of a grade crossing, which claim the municipality had by statute discretionary power to allow, the municipality having actually allowed the claim, may set off against the claimant's assignee a prior claim in its favor against the assignor.

It is no objection to such set-off that the assignee took the claim from the receiver of the claimant on its insolvency. *Assets Realization Co. v. City of Buffalo*, 571.

Facts not stating counterclaim.

See ATTORNEY AND CLIENT, 7.

Conversion — counterclaim on contract demurrable.

See PLEADING, 11.

Counterclaim alleging duress by pursuance of a legal remedy demurrable.

See SALE, 7.

**SHERIFF.**

Action against sheriff for conversion after sale of property under an execution.

See CONVERSION, 4, 5.

Failure of bidder on sheriff's sale to complete purchase — when purchaser loses title because of judgment against sheriff in another action.

See REAL PROPERTY, 8, 9.

**SPECIFIC PERFORMANCE.**

When tender by vendee of real property unnecessary.

See REAL PROPERTY, 3.

Denied assignee because of his default.

See REAL PROPERTY, 10.

When vendee of real property entitled to decree of.

See REAL PROPERTY, 14.

**STATUTE.**

[For tables of Session Laws and statutes cited and construed in this volume, see *ante*, pp. xlii-xlv.]

**STATUTE OF FRAUDS.**

Contract of sale by life tenant does not bind remaindermen not joining therein.

See REAL PROPERTY, 5.

**STATUTE OF LIMITATIONS.**

See LIMITATION OF ACTION.

**STAY.**

When stay of proceedings immaterial upon appeal by other parties.

See INTOXICATING LIQUOR, 5.

**STIPULATION.**

*Contract — stipulation settling controversies as to executors' accounts — when surrogate should not set aside stipulation.* When in settlement of several controversies respecting the accounts of an administrator the parties have entered into a stipulation which embodies a plan of settlement and division of the estate to be carried out with all convenient speed, within six months if possible, and it appears that the executor or his wife have advanced large sums of money to protect the property, relying upon the stipulation, and that many persons interested in the estate, and having acquired rights under the stipulation do not contest the same, and there is no proof that the executors have been guilty of any fraud or improper act except delay, the surrogate is without power to set aside the stipulation.

While the surrogate may relieve parties from a stipulation relating merely to a proceeding before him, a stipulation of the character described, and much

**STIPULATION** — *Continued.*

more extensive in its operation, should not be set aside even in so far as it allows the executor's accounts to be passed, if the executor, who has advanced large sums of money, relying thereon, cannot be replaced in his original position, especially when there was no fraud in procuring the execution of the agreement. *Matter of Richardson*, 164.

**STOCK CORPORATION LAW.**

Unlawful preferences by corporation contrary to section 48.

*See* BANKRUPTCY, 1-6.

**STOCKHOLDER'S ACTION.**

Allegations in action against directors of a corporation for accounting.

*See* PLEADING, 6-8.

**STREET SURFACE RAILROAD.**

*See* RAILROAD, generally.

**SUMMARY PROCEEDINGS.**

Injunction to restrain the execution of a warrant of dispossession.

*Carmer v. Rhodes*, 915.

Reference to hear and determine is unauthorized in proceedings to compel attorney to pay over moneys.

*See* ATTORNEY AND CLIENT, 2.

**SUPPLEMENTARY PROCEEDINGS.**

Estoppel of original owner and receiver from claiming title after property has passed to a second purchaser.

*See* EVIDENCE, 8.

**SURETY.**

*See* PRINCIPAL AND SURETY, generally.

**SURROGATE.**

Concurrent jurisdiction of surrogate and Supreme Court on accounting by executor.

*See* EXECUTOR AND ADMINISTRATOR, 2-6.

When surrogate should not set aside stipulation settling controversies as to executor's accounts.

*See* STIPULATION.

*See* EXECUTOR AND ADMINISTRATOR, generally.

**TAX.**

1. *Bequests to McAuley Mission subject to taxation.* The McAuley Water Street Mission, originally organized under chapter 319 of the Laws of 1848 and now subject to the provisions of the Membership Corporations Law, is not a religious corporation or a corporation "organized exclusively for Bible and tract purposes," and bequests to it are subject to a transfer tax. *Matter of White*, 869.

2. *Same—status of corporation.* The status of a corporation is to be determined by the statute under which it is incorporated and not by the nature of the acts it assumes to do thereunder.

Although the purposes of the McAuley Mission, as stated in its certificate of incorporation, would make it a religious corporation, not being incorporated under the Religious Corporations Law, it is not entitled to exemption from taxation under section 221 of the Tax Law. *Id.*

3. *Cemetery association in city of New York not liable for assessment on street opening.* Under the exemption afforded by sections 1 and 2 of chapter 310 of the Laws of 1879, a cemetery association is not only exempt from assessment for street improvements during the period its lands are used for cemetery purposes, but no assessment whatever should be laid against it to be collected in the future when the lands cease to be used for that purpose.

The exemption applies not only to the lands of such association actually occupied as graves, but to all lands held exclusively for cemetery purposes.

When commissioners have erroneously levied an assessment upon cemetery property to be collected when in the future the lands shall have ceased to be used for that purpose, the report should be sent back for a redistribution of

**TAX—Continued.**

the sum levied upon other property not exempt. *Matter of Mayor (Perry Avenue)*, 874.

4. *Same*—when abutting owner entitled to damage for easements—charter construed. When an owner of lands conveys portions to grantees with easements of light, air and access over lands proposed to be taken for a public street, reserving to himself the fee of the proposed street, he can convey to the municipality no greater right in the fee of the street than he himself retains. Hence, such original owner by ceding the fee of the street to a municipality does not deprive his prior grantees of the right to compensation for damages to their property caused by a change of grade as authorized by section 980 of the charter of Greater New York.

Section 979 of said charter indicates that a change of grade is a "regulation" of the street under section 980 for which an abutting owner may recover damage.

Section 951 of the charter of Greater New York, providing that after the taking effect of the act there shall be no liability to abutting owners for originally establishing a grade, relates exclusively to assessment for local improvements other than those confirmed by a court of record and has no application to a proceeding for street opening. *Id.*

5. *Property of non-resident placed in trust subject to taxation.* A deed of trust executed by a non-resident to a resident domestic corporation placing real and personal property in trust to pay the income and profits to the settler and another so long as the latter shall live or until the trust be revoked, creates not a mere agency but a trust of personal property, and the same is subject to taxation.

The fact that the trust deed contains provisions for revocation, not by the settler alone but by her in conjunction with other persons does not affect the validity of the instrument as creating a trust. *People ex rel. Van Norden Trust Co. v. Wells*, 881.

Award for property condemned by city not chargeable with taxes subsequently accruing.

*See* EMINENT DOMAIN, 2.

**TORT.**

Satisfaction by one joint tortfeasor discharges all.

*See* CONVERSION, 3.

**TRADE NAME.**

Injunction to restrain the unauthorized use of a trade name.

*See* INJUNCTION, 2.

**TRANSFER TAX.**

Membership corporation although organized for benevolent purposes is subject to transfer tax.

*See* TAX, 1, 2.

**TRANSPORTATION CORPORATIONS LAW.**

Order restraining shutting off gas denied when consumer refuses to give security for payment

*See* GAS AND ELECTRICITY.

**TRIAL.**

1. *Erroneous charge as to effect of attempt to bribe witness.* When it is a question as to whether the defendant's agent attempted to bribe or improperly influence a witness, it is error to instruct the jury that such an attempt, if found to have been made, affords a "presumption" against the whole of the defendant's evidence. Such an act creates no presumption whatever but is simply a circumstance to be considered by the jury in determining the weight of the evidence. *Ferrari v. Interurban Street Railway Co.*, 155.

2. *Same—failure to produce witnesses.* So, too, it is error to charge that the failure to call as a witness a person who was present at the alleged attempt at bribery creates a "presumption" that his testimony would have been unfavorable. No presumption exists against a party for failing to call a witness even though able to do so, but the jury may consider that if called the testimony of the absent witness would not have sustained the defendant's contention.

It is also error to sustain the plaintiff's attorney in the statement that the failure of the defendant to call as witnesses passengers on the car on which the plaintiff was injured raises a presumption against it.



**TRIAL — Continued.**

Such erroneous instructions require the reversal of a judgment for the plaintiff although the verdict be not against the weight of evidence if sharp questions of fact were presented and the plaintiff's evidence was open to criticism. *Id.*

Improper questions to show that defendant in negligence action is insured.

*Cobb v. United Engineering & Contracting Co.*, 904.

Reference to hear and determine is unauthorized in proceedings to compel attorney to pay over moneys.

*See* ATTORNEY AND CLIENT, 2.

Value of legal services a question of fact for the jury.

*See* ATTORNEY AND CLIENT, 8.

New trial granted for failure of court to instruct as to measure of damages.

*See* CONTRACT, 15.

When question of estoppel from asserting title after sale of property under execution is for jury.

*See* CONVERSION, 4, 5.

Power of justice of Municipal Court of Buffalo to grant adjournment.

*See* COURT.

Refusal to adjourn criminal trial sustained.

*See* CRIME, 2.

Fact that defendant did not flee from scene of crime may not be considered by jury.

*See* CRIME, 8.

Prejudicial comment by court as to defendant's rights in criminal trial.

*See* CRIME, 8.

Erroneous admission of false money found in defendant's possession unconnected with larceny — sufficiency of objection.

*See* CRIME, 9, 10.

When absence of witness does not justify adjournment.

*See* CRIME, 15.

Restriction upon the right to redirect examination of expert.

*See* EMINENT DOMAIN, 10.

Erroneous assessment of damages based upon affidavit of plaintiff.

*See* EVIDENCE, 5.

Improper comment by attorney as to assets of defendant — improper assumption by attorney of responsibility for complaint.

*See* NEGLIGENCE, 8.

When assumption of risk and acquiescence by employer in the use of elevator are questions for jury.

*See* NEGLIGENCE, 12.

Erroneous charge as to whether release of liability for injury was procured by fraud — failure to tender return of consideration not first available on appeal.

*See* NEGLIGENCE, 19, 20.

Charge in negligence cases.

*See* NEGLIGENCE, generally.

When amendment at former trial available upon new trial.

*See* PLEADING, 4.

When complaint may not be dismissed upon merits upon demurrer.

*See* PLEADING, 9.

Interpleader of rival brokers claiming commissions.

*See* PRACTICE, 10.

Erroneous dismissal of complaint in action for purchase price of goods because of delivery to third party.

*See* SALE, 9.

Erroneous holding as to burden of proof in action to establish will.

*See* WILL, 10.

**TRUST.**

1. *Deed executed by spendthrift for his own benefit — ratification.* A deed or conveyance by which one occupying a position of confidence and trust acquires an interest in the property conveyed is not absolutely void, but voidable at the election of the beneficiary or the *cestui que trust* and is valid until avoided. So, too, such deed may be ratified by the beneficiary or *cestui que trust*, and when once ratified no action can be maintained by the grantor or his personal representative to avoid it. *Bushe v. Wright*, 368.

2. *Same — when same not procured by fraud or undue influence.* Hence, when an uncle of a minor who has been living a life of dissipation and is heavily in debt induces him on reaching majority to convey property coming from the estate of his mother to a third person, who reconveys it to the uncle and another as trustees to pay the income to the spendthrift and his wife for life and at his death the principal to his descendants, if any, and if not, to his lawful heirs on his father's side, and the beneficiary acquiesces in the deed and receives the income until the time of his death, eleven years thereafter, his widow is not entitled to set aside the deed of trust as procured by fraud and undue influence. *Id.*

3. *Same — party — when widow of beneficiary may contest the validity of deed.* However, the widow being also a beneficiary under the deed of trust, is entitled to contest its validity in an action brought by the trustee to construe it, but she cannot demand an accounting by the trustee as executor of her husband's father when all the interested parties are not before the court. *Id.*

4. *Liability of representative of deceased life beneficiary for trust moneys misappropriated — when Statute of Limitations not available.* Action to determine the right of remaindermen in certain trust property alleged to have been misappropriated by the trustee and life tenant. It was established by a prior decision that under the testator's will a trust was created for the benefit of the testator's daughter for life with remainders over to her three children. During the administration of the trust the trustee turned over large portions of the estate to the life beneficiary who had dealt with it as her own as if not impressed with a trust. An accounting by representatives of the deceased trustee and life beneficiary being sought in the present action.

*Held*, that the Statute of Limitations did not begin to run in favor of the life tenant and as against the remaindermen until the death of the life tenant;

That as the life tenant received the property with knowledge of the trust and that it would go to the remaindermen at her death, she held as trustee *de son tort* and was not entitled to the benefit of the Statute of Limitations during her life;

That shares of stock in mining corporations of foreign States were not to be treated as real estate as to which the testator died intestate by reason of not having three witnesses to his will as required in said States, in the absence of proof that such property was real property by the foreign laws. Hence, such stock received by the trustee from the testator should be accounted for as part of the estate in which the remaindermen should share;

That the judgment of a foreign court in an action to compel the transfer of a legal title to said mining stocks was not binding upon remaindermen not made parties to the action;

That stock purchased with the proceeds of stock formerly owned by the testator was part of the trust estate, and a finding to that effect should be made when it appeared that the life beneficiary, having received insurance moneys from a loss by fire, purchased the stock with the insurance moneys but made good the loss upon her property by moneys drawn from the trust funds;

That a court of equity will preserve a trust estate intact, and where the trustee and life beneficiary having knowledge of the trust have commingled the trust moneys with their own and no rights of creditors or equities of innocent third persons have intervened, the burden is upon the representatives of the trustee and life beneficiary to show clearly that securities as to which the title is in issue were not purchased with the trust funds;

That the remaindermen were entitled to recover the amount of trust moneys applied for the improvement of the lands of the life beneficiary;

That the remaindermen were entitled to recover on a note given by the life beneficiary to the trustee in settlement of a shortage in the trust estate by reason of moneys received to her own use;

**TRUST — Continued.**

That when the representative of a deceased beneficiary has been charged with the value of securities bought with the proceeds of securities sold, he should not be also held liable for the latter. *Putnam v. Lincoln Safe Deposit Co.*, 468.

When attorney purchasing client's interest holds the same impressed with trust.

*See ATTORNEY AND CLIENT*, 5, 6.

Liquidating agent of national bank may be sued in State court for accounting.

*See BANKING*, 3.

When conveyance and contract do not create trust for benefit of benevolent corporation.

*See CONTRACT*, 12.

Complaint in judgment creditor's action to reach a trust fund.

*See DEBTOR AND CREDITOR*, 5.

Judgment creditor's action for affirmance of deed of trust for benefit of creditor — judgment roll admissible against trustee to establish debt.

*See DEBTOR AND CREDITOR*, 13-15.

Power of court to require testamentary trustees to exhibit records of their acts in foreign jurisdiction.

*See DISCOVERY*, 1.

Property of estate acquired by executor personally impressed with trust — election of beneficiaries to share therein.

*See EXECUTOR AND ADMINISTRATOR*, 11-13.

When no trust is created by deposit of money payable to depositor or his brother.

*See GIFT*.

When property of non-resident placed in trust subject to tax.

*See TAX*, 5.

When power of alienation not unlawfully suspended — foreign trustee subject to suit in State court.

*See WILL*, 1.

When devise of real property in trust for children does not suspend the power of alienation.

*See WILL*, 11.

Trustee cannot attack the existence of *cestui que trust* corporation in action to settle accounts — when benevolent corporation entitled to take.

*See WILL*, 12, 13.

Trust for foreign charitable use construed — when foreign unincorporated college cannot take.

*See WILL*, 14.

Trust for educational institutions, etc., not void for indefiniteness — power of Supreme Court to supervise gift to charitable use.

*See WILL*, 15-17.

**UNITED STATES.**

[For tables of sections of the United States Constitution and statutes cited and construed in this volume see *ante*, p. xii.]

**VENDOR AND PURCHASER.**

Contracts for the sale of real property.

*See REAL PROPERTY*, generally.

**WAIVER.**

Of conditions of contract in consideration of agreement to arbitrate — party withdrawing from arbitration cannot take advantage of waiver.

*See ARBITRATION*.

Facts showing waiver by vendor of a condition precedent.

*See EVIDENCE*, 8.

When payment of obligation imposed by duress constitutes waiver.

*See SALE*, 7.

**WIDOW.**

Restrictions as to property set aside for widow.

See EXECUTOR AND ADMINISTRATOR, 10.

**WILL.**

1. *When power of alienation not unlawfully suspended—foreign trustees subject to suit in State court.* Although the courts of this State have no jurisdiction over a foreign executor yet when he holds lands in this State as trustee he may be sued as such.

The testatrix left lands in this State in equal shares to the children of a deceased son, providing, "said real estate shall be held in trust by my executor \* \* \* until the youngest of said children shall attain the age of twenty-five years, at which time they shall take the same in fee simple, the net income therefrom being in the meantime paid to them or for their use and benefit."

*Held*, that in determining whether the power of alienation was unlawfully suspended, the first step is to ascertain the intent of the testatrix;

That it was not the intention that the trust should be perpetual, and the clause should be construed to mean that the trust should terminate when the youngest child living at the testatrix's death should attain the age of twenty-five years or the trust become impossible by reason of the prior death of such child;

That so construed the trust was valid because the remainders were limited upon one life only. *Coston v. Coston*, 1.

2. *When executors have power to sell although portion of devise invalid.* Although a power of sale given to executors fails when the entire devise is invalid for lack of capacity of the beneficiaries to take, yet, when a portion of the devise is valid, the power of sale may be exercised in so far as it concerns the valid devise. *Bender v. Paulus*, 23.

3. *Same—heir takes subject to power of sale.* A person who takes as heir owing to the invalidity of a devise holds the property subject to any burdens necessary to the carrying out of the valid provisions of the will. *Id.*

4. *Equitable reconversion.* When, in order to execute that part of the devise which is valid, a sale of the whole property is necessary, the executors have authority to sell, and the heir who inherits by reason of the invalidity of a portion of the devise is entitled only to a proportion of the proceeds of the sale, which is impressed with its original character of real estate. *Id.*

5. *When probated against testimony of subscribing witnesses.* A will may be probated notwithstanding the lack of memory of a subscribing witness or even in the face of his positive testimony denying proper execution. *Wyman v. Wyman*, 109.

6. *Same—facts not showing lack of testamentary capacity—when action of partition does not lie.* The testator, a lawyer fifty-seven years of age, two years before his death and when death was apprehended, made a holographic will which he carefully preserved. On probate the witnesses testified to due execution and to the testamentary capacity of the testator, but three years thereafter in an action of partition, while admitting their signatures to the attestation clause, denied the formalities of execution which they had previously sworn to. On all the evidence,

*Held*, that the will was properly admitted to probate and that the proof did not establish lack of testamentary capacity.

The will gave the whole residuary estate "absolutely and in fee simple to my beloved wife, \* \* \* her heirs and assigns forever. \* \* \* After the death of my beloved wife \* \* \* I request that my estate be closed up, should it be consistent so to do, and the proceeds to be divided share and share alike amongst my then living children."

*Held*, that, irrespective of whether the widow took the estate in fee simple or a life estate, an action for partition would not lie during her life. *Id.*

7. *When issue of deceased legatee take by implication.* When a testator leaves the residuary estate to his stepmother and his sister in equal portions and provides that "in the event of either dying without issue surviving, I give, devise and bequeath the share or portion of the one so dying to the survivor," the issue of the stepmother take her share by implication although she died before the testator. *Matter of Disney*, 378.

8. *Action to establish—burden of proof where testator's physician is sole beneficiary.* When a testator leaves his relations and goes to live with his physician, and eleven days thereafter makes a will naming the physician as sole

**WILL. — Continued.**

beneficiary, the burden is upon the latter to show that the will was not procured by undue influence. *Matter of Small*, 502.

9. *Same — evidence — lay witnesses may not characterize mental state of testator.* Lay witnesses called to show the mental capacity of a testator may characterize his acts as rational or irrational, but cannot characterize the acts as those of a rational or irrational person.

When the evidence of such lay witnesses is objected to as improper, incompetent, irrelevant and immaterial, and because the question is improper in form, a party who subsequently makes the "same objection except as to form" is entitled to the benefit of the other grounds of objection stated. *Id.*

10. *Same — trial — erroneous holding as to burden of proof.* When on a jury trial of an action to probate a will the court erroneously holds that the burden of proof is upon the contestant, and, although the proponent gave his proof first, subsequently holds that the contestant is not entitled to close the case, an exception to the court's ruling on those matters requires a new trial.

It is immaterial in such action whether said statements of the court be considered as erroneous rulings or erroneous statements informally made during the trial, for in either event a new trial will be granted if the remark were erroneous and prejudicial to the defeated party. *Id.*

11. *Real property — when power of alienation not suspended.* The power of alienation of real property is suspended only when there are no persons in being by whom an absolute fee in possession can be conveyed.

Hence, a devise of the use of lands to the testator's brother "until the last of my children shall become of age," when the property shall be sold and divided equally between the children, does not suspend the power of alienation. The children take vested remainders, and they, together with the owner of the precedent estate, may by joining in a conveyance give an absolute fee in possession. *Matter of Bray*, 538.

12. *Corporation — right to existence attacked collaterally.* The Havens Relief Fund Society, incorporated in 1870 for charitable purposes and endowed with special powers by chapter 301 of the Laws of 1871, obtained a valid corporate existence.

In any event the validity of its corporate existence cannot be attacked collaterally in an action by a testamentary trustee holding a trust estate for the benefit of that institution asking a determination of the validity of the trust and for a settlement of his accounts. The question of the legal existence of the corporation can only be raised by the sovereign power to which the corporation owes its life in some proceeding for that purpose brought by and on behalf of the sovereignty itself.

Even if defects exist in proceedings for an incorporation, the defect may be cured by subsequent legislation. *Smith v. Havens Relief Fund Society*, 678.

13. *Bequest to charitable uses — when benevolent corporation entitled to take.* Chapter 301 of the Laws of 1871, providing that the Havens Relief Fund Society may take gifts by will from those named in the certificate of incorporation without being limited to the amounts then limited by law, exempts such corporation from the limitations prescribed by section 6 of chapter 319 of the Laws of 1848 and chapter 860 of the Laws of 1860, and enables it to take bequests from its original incorporators without limit. *Id.*

14. *Trust for foreign charitable uses construed — when foreign unincorporated college cannot take — cy pres — gift to foreign unincorporated college not validated by chapter 701 of Laws of 1893.* (Per PATTERSON, P. J., LAUGHLIN and SCOTT, JJ.): When a will makes a direct gift to an unincorporated college maintained by a foreign State which college is incapable to take, the provisions of chapter 701 of the Laws of 1893 providing that gifts to benevolent uses in other respects valid shall not fall by reason of the indefiniteness or uncertainty of beneficiaries, has no application. Said act applies to gifts of the character therein named which shall "in other respects be valid" under the laws of this State and gives no power to a foreign unincorporated association to take or hold either absolutely or as trustee.

(Per LAMBERT and LAUGHLIN, JJ.): When a testator gives the use of half of his residuary estate, both real and personal, to his wife for life and at her death the remainder to a foreign unincorporated college maintained by a foreign State, to be used to found scholarships, with the provision that the treasurer of the

**WILL — Continued.**

college shall be custodian of the fund, etc., the gift is not made for the personal benefit of the institution but for the purpose of holding the fund in trust to support scholarships.

Such gift is invalid and cannot be made valid on the assumption that it was made to the foreign State in trust for the purposes expressed. This, because a State, in the absence of special statutory authority, cannot take and hold property as trustee.

Although under the provisions of section 2903 of the Code of Iowa a devise or bequest may vest title in that State provided the same be accepted, a devise not accepted by the executive council of that State at the death of the testator cannot be validated by a subsequent acceptance, as the testator's heirs have acquired vested rights therein.

As an unincorporated association in the State of Iowa cannot take and hold property for the purposes of administering a charitable trust, the devise is not made valid if it be construed to be made to the treasurer of the college.

Such foreign unincorporated college acquires no rights under the provisions of chapter 701 of the Laws of 1893, for the laws of this State have no extraterritorial operation and our courts cannot act as a trustee in a foreign State. Said statute is designed only to foster permanent charitable trusts within this State.

(Per HOUGHTON, J.): The devise aforesaid could be sustained as a bequest for educational uses in a foreign State by virtue of chapter 701 of the Laws of 1893, as amended, but for the fact that under the will there was a clear intent to give the property directly and absolutely to the foreign college which cannot take. *Catt v. Catt*, 742.

15. *Trust for charitable uses — corporations — power to take.* Section 6 of chapter 319 of the Laws of 1848 (as amd. by Laws of 1903, chap. 623) providing that certain corporations shall not take more than one-half of an estate under a will made within two months of the death of a testator, affects only corporations formed under that act and has no application to other corporations. *Matter of Shattuck*, 888.

16. *Same — when trust not void for indefiniteness.* When a testator devises his residuary estate in trust, the rents and profits to be expended by the executor annually and paid over to religious, educational and eleemosynary institutions as in his judgment shall seem advisable, not more than \$500 to be paid to any one institution in any one year, although the will is indefinite as to any particular beneficiary or any particular charitable purpose, the indefiniteness does not invalidate the gift when the purpose can be ascertained to be of a charitable nature. *Id.*

17. *Same — power of Supreme Court to supervise gift to charitable uses.* Such will should not be held to be invalid upon the ground that the trustee may in his discretion pay to corporations formed under the act of 1848 and not entitled to take, because by section 2 of chapter 701 of the Laws of 1893 (as amd. by Laws of 1901, chap. 291) the Supreme Court has control over gifts, bequests and devises of that nature, and may be appealed to at any time in order that the gift may take the course indicated, and not go to societies incompetent to take or for purposes not contemplated by the testator. *Id.*

When legatees authorizing executor to continue business not liable as partners.  
*See PARTNERSHIP*, 1.

When conveyance by devisee binding though child is born after execution of will  
*See PAYMENT*.

Liability of representative of deceased life beneficiary for trust moneys misappropriated.  
*See TRUST*, 4.

**WITNESS.**

Examination of party before trial.  
*See DEPOSITION*, generally.

Restriction upon the right to redirect examination of expert.  
*See EMINENT DOMAIN*, 10.

Erroneous charge as to effect of attempt to bribe witness and failure to produce witnesses.

*See TRIAL*, 1, 2.

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